IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 188

ROBERT BALDWIN,

Appellant,

—v.—

NEW YORK

APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

INDEX

	Page
Record from the Criminal Court of the City of New York, County of New York	
Complaint in Docket B16968, 16969	1
Minutes of August 11, 1968, Part 1A, before Honorable Thomas E. Rowan—Arraignment	3
Minutes of August 26, 1968, Part 2A before Honorable Amos S. Basel	5
Denial of motion for jury trial	7
Testimony of Patrolman Joseph Crowley	
—direct	8
—cross	10
—redirect	14

Page

Record from the Criminal Court of the City of New York, County of New York—Continued

Minutes of August 26, 1968, Part 2A before Honorable Amos S. Basel—Continued

Denial of motion to dismiss 15

Motion to acquit 16

Decision of the court 16

Minutes of September 3, 1968, Part 3 before Honorable Amos S. Basel, imposing sentence 18

Order of the Appellate Term of the Supreme Court, First Judicial Department, January 10, 1969 22

Proceedings in the Court of Appeals of the State of New York

Remittitur 23

Opinion, Scileppi, J. 25

Dissenting opinion, Burke, J., concurred in by Keating, J. 36

Order granting motion for leave to proceed in forma pauperis 49

Order noting probable jurisdiction 49

IN THE CRIMINAL COURT
OF THE CITY OF NEW YORK
PART 1A COUNTY OF NEW YORK

STATE OF NEW YORK,)
) SS.:
COUNTY OF N.Y.)

COMPLAINT—August 11, 1968

J. J. Crowley, of No. 625 8th Ave. NYC being duly sworn, says that on 8/10/68 at about 9 PM at Port Authority Bus Terminal, 625 8th Ave. County, City and State of New York, the defendant(s) Arthur Bethea and Robert Baldwin committed the offense(s) of:

_____ ATTEMPTED PETIT LARCENY (Sec. 110.00, 155.25 Penal Law), in that said defendant attempted to steal property;

_____ PETIT LARCENY (Sec. 155.25 Penal Law), in that said defendant did steal property;

_____ JOSTLING (Sec. 165.25 Penal Law), in that said defendant, in a public place, intentionally and unnecessarily placed his hand in the proximity of a person's pocket and handbag;

__X__ JOSTLING (Sec. 165.25 Penal Law), in that said defendant, in a public place, intentionally and unnecessarily jostled and crowded another person at a time when a third person's hand was in the proximity of such person's pocket and handbag;

_____ FRAUDULENT ACCOSTING (Sec. 165.30 Penal Law), in that said defendant did accost a person in a public place and, at that time and place and subsequently in any place, made statements to said person of a sort commonly made and used in the perpetration of a known type of confidence game;

_____ FORTUNE TELLING (Sec. 165.35 Penal Law), in that said defendant, for a fee or compensation, which he directly and indirectly solicited and received, claimed

and pretended to tell fortunes and held himself out as being able, by claimed and pretended use of occult powers, to answer questions and give advice on personal matters, and to exercise, influence and affect evil spirits and curses in that: Deponent states that he observed defendants acting in concert at the above stated time and place, in that they unnecessarily and intentionally did interfere with and jostle an unidentified female in that defendant Arthur Bethea did crowd said female and attempted to shield actions of defendant Robert Baldwin who did place his hand in the proximity of unknown female's purse.

/s/ Pet. J. J. Crowley
Affiant

Sworn to before me
8/11/68

/s/ Thomas E. Rohan
Judge

IN THE CRIMINAL COURT
OF THE CITY OF NEW YORK
PART 1A COUNTY OF NEW YORK

Docket Nos. B-16968-9

CHARGE: 165.20 P.L.

PEOPLE OF THE STATE OF NEW YORK
on complaint of J. J. CROWLEY

vs.

ARTHUR BETHEA, ROBERT BALDWIN

New York, N. Y.

MINUTES OF AUGUST 11, 1968

ARRAIGNMENT

BEFORE: HON. THOMAS E. ROHAN, Presiding Judge.

APPEARANCES:

FOR THE PEOPLE:

DAVID FULLER, ESQ., Assistant District Attorney.

FOR THE DEFENDANTS:

ROBERT FERRARO, ESQ., Legal Aid Society.

COURT OFFICER:

HERMAN SHERMAN

JACK L. BERMAN
Official Court Reporter

[fol. 2] COURT OFFICER: Docket Numbers B-16968 and B-16969, Arthur Bethea and Robert Baldwin, charged with 165.20 of the penal law on the complaint of J. J. Crowley. Raise your right hand please. Do you swear to the truth of the contents of this affidavit?

THE COMPLAINANT: I do.

COURT OFFICER: Counsel, do you waive the public reading of the charges and rights?

DEFENDANT'S COUNSEL: Yes, I do. Your Honor, may I refer this to 2-A? What date?

ASSISTANT DISTRICT ATTORNEY: The 26th is suggested.

DEFENDANT'S COUNSEL: August 26th.

THE COURT: The plea is not guilty?

DEFENDANT'S COUNSEL: Yes, sir.

THE COURT: A thousand dollars each.

COURT OFFICER: You may communicate free of charge from the Office of the Warden.

[Reporter's Certificate to foregoing paper omitted in printing.]

IN THE CRIMINAL COURT
OF THE CITY OF NEW YORK
COUNTY OF NEW YORK PART 2A

Docket Nos. B16968
B16969

CHARGE: 165.25 P.L.

[Title Omitted]

100 Centre Street
New York, N. Y.

MINUTES OF AUGUST 26, 1968

BEFORE: HON. AMOS S. BASEL, Justice.

APPEARANCES:

FRANK HOGAN, District Attorney, For the People. 155 Leonard Street, New York, N. Y. 10013

By: LAWRENCE DUBIN, A.D.A.

ANTHONY F. MARRA, ESQ., For the Defendants. 100 Centre Street, New York, N. Y. 10013

By: J. JEFFREY WEISENFELD, ESQ.
And: JEFFREY ALLEN, ESQ., of Counsel.

[fol. 2] PROCEEDINGS

THE BRIDGEMAN: Number 13, Arthur Bethea, Robert Baldwin. This is on the prison calendar.

Detective John Pagano.

MR. WEISENFELD: Your Honor, on this case Defendant has another case which we are attempting to either put on this calendar or have this case adjourned to the same day as the other case.

I'd ask for a second call.

THE COURT: There are two Defendants here.

MR. WEISENFELD: Just as to the Defendant Bethea.

THE COURT: Second call.

* * * *

THE BRIDGEMAN: Number 13 on the prison calendar, Arthur Bethea, Robert Baldwin.

Detective Joseph Pagano.

MR. DUBIN: Ed, are there two cases regarding these Defendants on today's calendar?

THE BRIDGEMAN: So far as I know I don't have any other paper on this.

MR. ALLEN: Your Honor, could we have another call.

THE BRIDGEMAN: Third call.

* * * *

[fol. 3] THE BRIDGEMAN: Number 13, prison calendar, Arthur Bethea, Robert Baldwin.

Detective Pagano.

THE COURT: Yes, sir, you ready on this case?

THE BRIDGEMAN: Gentlemen, what's your pleasure?

MR. DUBIN: Your Honor, the People would be ready to proceed today. However, due to the calendar congestion this morning and the fact that we've already marked a number of cases ready I don't believe that we'll reach this case in the course of today's proceedings, and, therefore, I'd like to let the officer go so he can resume his duties.

Can we have an early adjourned date.

THE COURT: They're in, the police officer is here. It's 2:30. Maybe we can reach it.

MR. ALLEN: Defendants are ready.

THE COURT: I don't think we'll reach it, but we could, it's possible.

* * * *

THE BRIDGEMAN: Recall number 13, Arthur Bethea, Robert Baldwin, on the prison calendar.

Have you got a date, officer?

MR. DUBIN: The People are ready.

[fol. 4] THE BRIDGEMAN: This is an adjournment.

For the record, it's Patrolman Crowley.

Legal Aid.

THE COURT: What date do you want?

(Whereupon, both counsel approached the bench.)

THE BRIDGEMAN: Number 65 on the calendar, Arthur Bethea is here also on a bench warrant which was issued on March 19, 1968 by Judge Solniker. The Defendant failed to appear at 12:10. The parole was revoked and the warrant ordered.

That's as to Bethea, your Honor, Defendant number one on 13.

THE COURT: What about that warrant? Put that over. I'll fix bail.

Counsel, what do you want to do on this warrant against Bethea?

MR. ALLEN: Your Honor, on the face I'd ask the Court to dismiss because on the face of the Complaint it seems, if I may make a motion on a motion to suppress, it seems that the evidence would have to be suppressed.

MR. DUBIN: Your Honor, the People are ready to proceed to trial on this case. I believe the defense attorney is alsy ready.

[fol. 5] THE COURT: Let's adjourn the other cases.

* * * *

THE BRIDGEMAN: This is number 13 on today's calendar, Docket No. B16968 and 16969.

Defendant Arthur Bethea, Defendant Robert Baldwin are charged with violation of Section 165.25 of the Penal Law, and this is on the complaint of officer Crowley of the Port Authority.

Both sides are ready?

MR. DUBIN: Yes, People are ready.

MR. ALLEN: Yes.

Your Honor, at this time the Defendants make a motion for a jury trial.

THE COURT: Motion is denied.

PATROLMAN JOSEPH CROWLEY, Shield No. 1168, Port Authority Police, called as a witness by and on behalf of the People, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DUBIN:

Q Officer Crowley, were you on duty on August 10, 1968, at about 9:00 P.M.?

A Yes, sir, I was.

[fol. 6] Q Pursuant to your duties did you have occasion to be at the Port Authority Bus Terminal located at 625 Eighth Avenue?

A Yes, I was.

Q While there, officer, at that location did you make certain observations of the Defendants Robert Baldwin and Arthur Bethea?

A I did.

Q Will you tell us what, if anything, you saw and what you did.

A At the aforementioned time and place subject Bethea placed and positioned his body—

MR. ALLEN: At this time, your Honor, I ask the officer not to read from his piece of paper that he has.

THE COURT: Yes.

Officer, if you need to refresh your recollection indicate that. Look at the sheet, try to refresh your recollection. If not we will put the sheet in evidence.

THE WITNESS: That's all right, your Honor, I'll put the sheet away.

Q Officer, tell us what you saw and what, if anything, you did.

A On the above time and date, which was August [fol. 7] the 8th at 9:00 P.M., I observed the two Defendants, Bethea and Baldwin, descend down the escalator stairway. At this time subject Bethea positioned himself directly alongside an unidentified female, and Defendant Baldwin at this time positioned himself to the rear and slightly to the left of this unidentified female.

At that time, as they continued down the stairway, subject Bethea turned his body slightly to the left, and at that instant Baldwin then proceeded to bring his right hand about and stick it into this woman's—open her clasp and stick his hand in her purse removing an unknown sum of money.

Q What happened at that point, officer, if anything?

THE COURT: Where were you at this point?

THE WITNESS: I was observing them from the above balcony area on the mezzanine.

Q Officer, what happened after you saw the Defendant Baldwin take the money out of the unknown female's pocket?

A At that time my partner, Detective John Pagano, and I proceeded ourselves to descend down the escalator so we could catch up to the two defendants.

Q And did you, in fact, catch the Defendants?

A Yes, we did.

Q Did you place them under arrest at that point, officer?

A Yes, we did.

[fol. 8] Q Officer, let me ask you this: When the Defendants positioned themselves on the escalator in close proximity to the unknown female, approximately how far were they from the unknown female?

A Well, the Defendant Bethea was right abreast of the unknown female.

Q Did there come a time during the course of the ride down the escalator when the Defendant Bethea actually touched the unknown female?

A Yes, there was.

Q And the Defendant Baldwin was to the rear of the female; is that correct?

A To the rear and a little to the left.

Q Officer, what was the condition of the escalator with regard to the pedestrian traffic on it at that point?

A It was very heavy at that time.

THE COURT: Let me ask you this: You say you saw him take money out of the purse?

THE WITNESS: That's right, your Honor.

THE COURT: What form was the money in, loose, a wallet, how?

THE WITNESS: The money appeared to me to come out in a loose package.

[fol. 9] THE COURT: Did you search the Defendants are you arrested them?

THE WITNESS: Yes, we did, your Honor.
THE COURT: Did you find money?
THE WITNESS: There was money, your Honor.
THE COURT: How much?
THE WITNESS: Your Honor, I don't recall the amount.
THE COURT: Which Defendant had the money?
THE WITNESS: Defendant Baldwin had money.
THE COURT: In what form was the money?
THE WITNESS: Your Honor, I would have to refer back to the Court papers.
THE COURT: Take a look at your notes. If that refreshes your recollection, testify.
THE WITNESS: I don't believe I have it on my notes, on the Court record.
THE COURT: Take a look at the Complaint and see if that refreshes your recollection.
THE WITNESS: Thank you.

(Examining documents)

Thank you.
THE COURT: Can you answer the question?
[fol. 10] THE WITNESS: Yes, the amount that Defendant Baldwin had was $10 bill.
THE COURT: All right.
Anything more, Mr. D.A.?
MR. DUBIN: No, I have nothing further, judge.
You may inquire.

CROSS-EXAMINATION

BY MR. ALLEN:

Q Patrolman Crowley—
A Yes, sir.
Q —have you ever seen these Defendants before?
A No, I haven't, sir.
Q Have you ever seen wanted posters of them in the Port Authority?
A No.
Q You have absolutely no rememberance of seeing or hearing their names before this incident?

A Other than the night of the arrest.

Q When you say you were stationed on the balcony, what—how far were you from the Defendants?

A Well, if I may illustrate, it is similar to the set up that his Honor is sitting in now and the escalators to run down and up in this section here, whereupon, if [fol. 11] the Court would permit, I would get up and lean over the balcony area this way and observe the descending and ascending movement.

THE COURT: The witness indicates that he is leaning on his elbows looking over a parapet.

Q How far would you say you were from the Defendants when you allegedly observed this?

A Approximately ten feet.

Q How far down the escalator would you say they were?

A During that time of movement or course of movement—about the 15th step down.

Q Would you say that's halfway down?

A Less than half.

Q Were there people behind the Defendants?

A That's correct.

Q At what height would you say—at what position would you say the Defendant's hand was in when he allegedly took the money?

A Which Defendant are you referring to?

Q Defendant Baldwin.

A What position was his hand when what, sir?

Q When you saw him take the money.

A His hand, it was his right hand movement.

Q In what—in relation to his body what position was [fol. 12] it in?

A I don't understand the question.

Q In other words, how—would you say it was chest high?

A No, sir.

Q Would you say it was waist high?

A It was about belt high.

Q And you were standing above the escalator; is that correct?

A That's correct, sir.

Q The Defendants were about 15 steps below you?
A That's correct.
Q And there were people behind the Defendants?
A Yes, there were.
Q And you saw the Defendant's hand waist high?
A I did, sir.
Q Well, did you have a clear view of the Defendant's hand?
A I certainly did.
Q Did you see over the people behind the Defendants?
A No, sir.
Q Would you explain to the Court what was in your line of vision from yourself to the Defendant.
A Yes, both the Defendants were in clear line with me.
Q But you just stated there were people standing [fol. 13] right behind the Defendant?
A That's correct, the escalator goes down this way, sir.
THE COURT: Indicating a 45 degree angle.
Q What position—you were standing perpendicular to the Defendants?
A I was in a direct line with them, yes.
Q Was the Defendant's hand in the pocket?
A I saw Defendant Baldwin reach into the pocketbook.
THE COURT: Let me ask you this: The balcony on which you were standing, what kind of angle is it to the escalator?
THE WITNESS: Your Honor, it's just as square as this would be and the escalator running down the middle on a 45.
THE COURT: Runs down the center of—
THE WITNESS: That's correct, your Honor, it would head down inwards here.
THE COURT: In other words, the balcony you see over the heads of everybody then?
THE WITNESS: Your Honor, I could see in line with them on the side vision.
Q Officer, what hand was the Defendant reaching into the unknown female's—

[fol. 14] A Right hand.

Q Was the unknown female standing on the right of the Defendant?

A The unidentified female was standing to the right of the Defendant Bethea, and she was in front and slightly to the right of the Defendant Baldwin.

Q Was the railing—how high was the railing of the escalator?

A Less than—it's about four foot.

Q And how tall is the Defendant?

A Which Defendant?

Q Excuse me, the unknown female.

A The unknown female?

Q Yes.

A I'd say she was about five foot six, five foot seven.

Q So, would you say—and where did the money allegedly come from?

A From her pocketbook.

Q Her pocketbook?

A Yes, sir.

Q Was her pocketbook hanging by her side?

A She had her pocketbook strapped on her arm about her chest high.

[fol. 15] Q Was the—did the Defendant Baldwin's hand, did it—how far into the pocketbook was it?

A I'd say about wrist, wrist deep.

Q Did you see the Defendant Bethea touch the female?

A It was a body contact.

Q In your opinion would you say it was an intentional body contact?

A Yes, I would, sir.

Q Would you say there were many people on the escalator?

A I stated so before, yes.

Q Did you see other people touching each other?

A I saw other people descending the escalator together.

Q In other words, would you say that everyone on the escalator was in contact with each other?

A No, sir.

Q Would you say a good majority of the people were touching each other?

A At that point I couldn't say, I was observing the two Defendants.

Q You stated to the Court that you originally—initially what did you see the Defendant take out of the pocketbook?

A A sum of money, sir.

Q And what description did you use to describe that [fol. 16] money, do you remember?

A No, but—

Q Did you say a loose package?

A I believe I said a loose package.

Q And what did you discover upon arresting the Defendants and searching them? What did you find?

A I found loose money on them, sir.

Q One $10 bill?

A There was a $10 bill.

Q Was there anything else?

A I don't recall.

Q Did you find anything on the Defendant Bethea?

A I don't remember, sir.

MR. ALLEN: No further questions.

REDIRECT EXAMINATION

BY MR. DUBIN:

Q Officer, the Defendant Baldwin was on the step immediately behind the unknown female and the Defendant Bethea; is that correct?

A That's correct.

Q Was there anyone else on the step with the Defendant Baldwin?

A No, sir, because he positioned himself in the middle [fol. 17] of the step slightly to the left of the—

Q Was there anyone on the step immediately behind the Defendant Baldwin?

A Yes, there was.

Q Was there anyone on the step immediately in front of the unknown female and the Defendant Bethea?

A Yes, there was, sir.

Q Officer, approximately how far above the Defendants were you when you made your observations?

A Heightwise?

Q Yes.

A It was five feet distance away, approximately ten feet.

Q Officer, am I correct in assuming that when you made your observations Defendants passed right alongside of where you were standing?

A That's true.

Q At that point approximately how far would they be from you?

A About five feet, sir.

Q And at what point on this ride down the escalator did the actual incident you described, the Defendant Baldwin's hand going into the pocketbook and removing the money take place?

A I'd say ten feet out and two feet to the left of me.

[fol. 18] Q And your position on the balcony with regard to the Defendants, was that looking over the escalator as it was going down on a 45 degree angle?

A That's correct.

MR. ALLEN: Your Honor, I object, I believe this has been gone into already.

THE COURT: I'll overrule the objection.

Q Officer, were you looking ahead of the Defendants as they were going down the escalator or at a sideview?

A It could be stated a slight angle, sir.

MR. DUBIN: All right, I have nothing further.

MR. ALLEN: No further questions.

THE BRIDGEMAN: People's case?

MR. DUBIN: That's the People's case.

(Witness excused)

THE BRIDGEMAN: Please rise.

MR. ALLEN: At the end of the People's case, your Honor, I move to dismiss on the grounds that People failed to establish a prima facie case as to each Defendant.

THE COURT: Motion is denied.

MR. ALLEN: Defendants will call no witnesses, your Honor. Defense rests.

[fol. 19] THE COURT: Make your motion.

MR. DUBIN: People rest.

THE COURT: Make your motion on the whole case.

MR. ALLEN: Your Honor, defense rests.

At the close of the entire case I'd ask to acquit as to Defendant Bethea. All that was shown was that he was standing behind the female. The officer stated he found money on both of them originally and on cross-examination he said he found money only on the Defendant Baldwin.

I believe the Defendants have—are known in that area, and I'd ask the Court to take all that into consideration and acquit them as to these charges.

THE COURT: Anything you want to say, Mr. Dubin?

MR. DUBIN: Yes, your Honor.

Just briefly I'd like to read the wording of the section with which the Defendants are charged, 165.25 of the Penal Law, they're charged with jostling, in that said Defendant in a public place intentionally and unnecessarily crowded another person at a time when a third person's hand was in the proximity of such person's pocket or handbag.

Your Honor, I believe the testimony elicited from the [fol. 20] police officer on direct examination revealed that that is what took place at the Port Authority Bus Terminal. The Defendant Bethea crowded against her and the Defendant Baldwin reached from behind and went into her pocketbook.

I believe that the People have sustained their burden and that the Defendants should be found guilty.

THE COURT: In my opinion the police officer was a very forthright and credible witness, and I find both Defendants guilty after trial.

Record and sentence for when?

DEFENDANT BALDWIN: Your Honor, I'd like to say that I admit—

MR. ALLEN: What do you want to say?

(Whereupon, the Defendant Baldwin and Mr. Allen had a discussion.)

THE COURT: Record and sentence.
We don't need the police officer.
9/3, record and sentence.
Both Defendants are remanded.
THE DEFENDANT: Before we do that, your Honor, disposition on 65, there is a bench warrant outstanding against Arthur Bethea.
[fol. 21] THE COURT: Do you want to do anything with this, Mr. D.A.?

(Whereupon, Mr. Dubin and Mr. Allen approached the bench.)

MR. DUBIN: Your Honor, in light of the decision with regard to the case just tried the People would at this time move to dismiss the charge pending against the Defendant on Calendar Number 65 of today's calendar, Docket B3767, and that is to the Defendant Arthur Bethea, that being criminal possession of a dangerous drug in the 4th degree, possession of one alleged marijuana cigarette.
THE COURT: Put them in.

* * * *

I hereby certify that this is a true and correct transcript of the proceedings in the above-entitled matter.

/s/ George Aaronson
GEORGE AARONSON

[Reporter's Certificate to foregoing paper omitted in printing.]

[fol. 1] IN THE CRIMINAL COURT
OF THE CITY OF NEW YORK
PART 3 : COUNTY OF NEW YORK

Docket Nos. B16968
B16969

[Title Omitted]

Charge: 165.25 of the Penal Law

MINUTES OF SEPTEMBER 3, 1968

100 Centre Street
New York, N. Y.

BEFORE: AMOS S. BASEL, Judge

APPEARANCES:

FOR THE PEOPLE

JEFFREY C. HOFFMAN, ESQ., Assistant District Attorney

FOR THE DEFENDANT

LEGAL AID SOCIETY

By: JAMES BERNARD, ESQ.

COURT OFFICER

MELVIN SCHNITZER

THOMAS J. LANDERS, C.S.R.
Official Court Reporter

[fol. 2] COURT OFFICER: Added cases to the Calendar, Docket B16968 and 16969, Arthur Bethea and Robert Baldwin.

MR. BERNARD: Your Honor, each defendant is ready for sentence.

THE COURT: Do you know of any legal cause why sentence should not now be imposed?

MR. BERNARD: If it please the Court, I'd like to be heard in mitigation of sentence.

THE COURT: Yes.

MR. BERNARD: Addressing myself first to the defendant, Bethea, in mitigation of sentence I would state to the Court this defendant is 23 years of age. He has some history of contact with the courts. However, I point out to Your Honor that he has never been convicted of a felony. His involvements have been—well, not to be minimized—at the time of his arrest he was a duly enrolled and pursuing student in the Manpower Program where he was learning merchandising. And he lives alone. He has no wife or children; no one suffers because of his illegal activities except himself.

The codefendant is 26 years of age. He has some also [fol. 3] extensive history of prior contact with the courts. However, he also has never been convicted of a felony nor has he been involved in anything of a really serious nature. At the time of his arrest he was employed on a full-time basis at Dill's Hat Cleaning Company and had been so employed for a continous period of six years. It shows something. He has some continuity to some of the arrests of his life. He also lives alone.

I ask that the Court be as lenient as possible in imposing sentence. I'm pointing out also to the Court—Your Honor presided at the trial.

THE COURT: Yes. That's why it's sent here.

MR. BERNARD: Your Honor knows all the particulars; the charges are not serious although not to minimize it.

SENTENCE

THE COURT: This is a jostling case which took place in the Port Authority Bus Terminal. There were a lot of people there and these defendants were going down an escalator and the police officer observed them on the balcony above the escalator and arrested both of them.

Record discloses that the defendant here under the name of Robert Baldwin was first arrested under the name of Robert Stewart in Newark, New Jersey, for [fol. 4] auto theft by the FBI in 1960 for which he received one year probation.

He was then arrested in 1960, again, one year probation. Then there are a series of arrests in New Jersey which culminated in receiving a year sentence for stolen automobile in 1962.

In 1963, unlawful use of an automobile, one year, again. In 1964, still in New Jersey, assault and burglary, four months. In 1964, larceny, four months. In 1965, burglary, six months. In 1966, there's an arrest without a disposition.

He then appears to have shifted his activity to Manhattan and in 1963 he was arrested here for jostling and no disposition of that. And '68 he was arrested here for burglary and no disposition on that and then he was arrested for jostling and he was convicted by me after trial.

The other defendant, Bethea, appears to be a native. He was first arrested in Queens in 1962, and the case was dismissed in the Adolescent Court. He was then given Youthful Offender treatment on another arrest in '62.

In '64 he was arrested for assault and robbery and the case was dismissed. In '65 he was arrested for grand [fol. 5] larceny in Brooklyn, no disposition. '65 grand larceny, again, in Brooklyn, for which he received 60 days.

In '65, grand larceny, pocketbook snatch. Now, in Manhattan, he got one year in the penitentiary. In '67, jostling, there's no disposition. In '68, January, jostling and it doesn't appear to be any disposition on that. And then February '68, there's a drug arrest which is undisposed of; and then this jostling. BCI sheet also shows that bench warrant is issued for him in the drug case.

I think under those circumstances, both of these defendants have had many encounters with the law and they have had an opportunity to try to change their way of life and it hasn't been any use, so under the circum-

stances I think that now I have to be worried about the people who frequent the bus terminal and other places in this City and protect them from the merchansing which he is studying, so it's the sentence of this Court that each defendant be sentenced to one year in the penitentiary. New York City Reception and Classification Center.

[Reporter's Certificate to foregoing paper omitted in printing.]

At an Appellate Term of the Supreme Court, First Department, held on the County Court House, Borough of Manhattan, City of New York.

January 10, 1969

Present:—HON. SAMUEL H. HOFSTADTER, *J.P.*
" " JACOB MARKOWITZ (taking no part)
" " PETER A. QUINN, *Justices*

January No. 621

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

vs.

ROBERT BALDWIN, a/k/a ROBERT STEWART,
DEFENDANT-APPELLANT

An appeal having been taken to this court by defendant from a judgment of conviction of the Criminal Court of the City of New York, County of New York, after trial before Hon. Amos S. Basel, on the 26th day of August 1968, upon the charge of violation of Section 165.25 of the Penal Law, and having been sentenced by Hon. Amos S. Basel on the 3rd day of September, 1968, as follows:

1 year imprisonment

and the said appeal having been heard and due deliberation having been had thereon,

IT IS ORDERED AND ADJUDGED that the said judgment so appealed from be and the same is hereby affirmed.

Enter

/s/ S. H. H.
Justice Appellate Term
Supreme Court, First Department

[Clerk's Certificates to foregoing paper omitted in printing]

No. 24

STATE OF NEW YORK, SS:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 6th day of March in the year of our Lord one thousand nine hundred and sixty-nine, before the Judges of said Court.

WITNESS,

THE HON. STANLEY H. FULD
Chief Judge, Presiding
RAYMOND J. CANNON
Clerk

REMITTITUR—March 6, 1969

App. T. 1. No. 24. 69

THE PEOPLE &C., RESPONDENT

vs.

ROBERT BALDWIN, APPELLANT

BE IT REMEMBERED, That on the 22nd day of January in the year of our Lord one thousand nine hundred and sixty-nine, Robert Baldwin, the appellant—in this cause, came here unto the Court of Appeals by Milton Adler, his attorney—, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Term of the Supreme Court in and for the First Judicial Department. And The People &c., the respondent—in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Messrs. Nathan Z. Dershowitz

and Leon B. Polsky, of counsel for the appellant—, and by Mr. Michael R. Juviler, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the judgment herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Criminal Court of the City of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Criminal Court of the City of New York, before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Criminal Court, before the Judges thereof, &c.

/s/ Raymond J. Cannon
Clerk of the Court of Appeals
of the State of New York

COURT OF APPEALS, CLERK'S OFFICE,
Albany, March 6, 1969.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ Raymond J. Cannon
Clerk

[SEAL]

[Triple Certificate to foregoing paper omitted in printing.]

In the Matter of FRANK S. HOGAN, as District Attorney of the County of New York, Appellant, and LOUIS J. LEFKOWITZ, ATTORNEY-GENERAL OF THE STATE OF NEW YORK, Intervenor-Appellant, *v.* JACK ROSENBERG et al., and MARVIN PURYEAR, Respondent.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

v.

ROBERT BALDWIN, APPELLANT

OPINION—Decided March 6, 1969

* * * *

SCILEPPI, J. The issue presented for our consideration in the first of two cases to be discussed is whether a defendant facing possible imprisonment of not more than one year is entitled to a trial by jury.

On August 10, 1968 the appellant, Robert Baldwin, then 26 years old, was arrested for jostling, a class A misdemeanor carrying a maximum term of imprisonment of one year (Penal Law, §§ 165.25, 70.15, subd. 1). The appellant's pretrial motion for a jury trial was denied. The trial, conducted without a jury pursuant to section 40 of the New York City Criminal Court Act, resulted in a conviction and the appellant was sentenced to the maximum one-year term. The judgment of conviction was affirmed by the Appellate Term, First Department, and the appellant has appealed pursuant to permission of the Chief Judge of this court.

The appellant argues that the United States Supreme Court's recent decision in *Duncan* v. *Louisiana* (391 U. S. 145) is dispositive of the issue presented herein. We do not agree.

Duncan held that the right to a trial by jury guaranteed by the Sixth Amendment is incorporated in the Fourteenth Amendment's mandate of due process. The court hastened to note, however, that the constitutional right to a trial by jury applies only to "serious" crimes, and not to the so-called "petty" offenses. The court then embarked upon a definitional journey to determine wheth-

er Louisiana's simple battery statute with a maximum term of two years was of such a serious nature that the deprivation of a jury trial for such an offense was violative of the now incorporated Sixth Amendment guarantee.

In holding that punishment by imprisonment for two years *ipso facto* renders a crime serious, Justice WHITE, writing for the majority, stated:

"So-called petty offenses were tried without juries both in England and in the Colonies and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment's jury trial provisions. There is no substantial evidence that the Framers intended to depart from this established common-law practice, and the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications. These same considerations compel the same result under the Fourteenth Amendment. Of course the boundaries of the petty offense category have always been ill-defined, if not ambulatory. In the absence of an explicit constitutional provision, the definitional task necessarily falls on the courts, which must either pass upon the validity of legislative attempts to identify those petty offenses which are exempt from jury trial or, where the legislature has not addressed itself to the problem, themselves face the question in the first instance. In either case it is necessary to draw a line in the spectrum of crime, separating petty from serious infractions. This process, although essential, cannot be wholly satisfactory, for it requires attaching different consequences to events which, when they lie near the line, actually differ very little.

"In determining whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial, we are counseled by *District of Columbia* v. *Clawans* [300 U. S. 617], to refer to objective criteria, chiefly the existing laws and practices in the Nation. In the federal system, petty

offenses are defined as those punishable by no more than six months in prison and a $500 fine. In 49 of the 50 States crimes subject to trial without a jury, which occasionally include simple battery, are punishable by no more than one year in jail. Moreover, in the late 18th century in America crimes triable without a jury were for the most part punishable by no more than a six-month prison term, although there appear to have been exceptions to this rule. *We need not, however, settle in this case the exact location of the line between petty offenses and serious crimes. It is sufficient for our purposes to hold that a crime punishable by two years in prison is, based on past and contemporary standards in this country, a serious crime and not a petty offense.*" (*Duncan* v. *Louisiana, supra,* pp. 160-162; emphasis added.)

It is evident from the majority opinion that *Duncan* cannot reasonably be interpreted as being dispositive of the present case, but rather should be read for the proposition that statutes which make crimes punishable by imprisonment for terms of two years or more are to be viewed as serious, notwithstanding how the people of a particular jurisdiction might characterize the crime. The obvious rationale functioning is that necessarily coupled with the incorporation of the Sixth Amendment's guarantee of a right to a trial by jury is the imposition of Federal standards. *Duncan,* however, fails to draw the exact line of demarcation where the maximum punishment to be imposed is less than two years, but rather states that "the definitional task necessarily falls on the courts" to characterize the various crimes. In the absence of any further indication from the Supreme Court as to what the Federal standards are, it is our opinion, after performing that definitional task, that the people of our State have historically drawn the proper distinction between petty and serious crimes so as to satisfy the constitutional mandate of the Sixth Amendment.

At common law, misdemeanors, crimes punishable by imprisonment for no more than one year, were not indictable offenses and as such were not afforded jury trials, but rather were tried by the Magistrate alone.

When the phrase "trial by jury" was placed in the Sixth Amendment, it carried with it "the meaning affixed to [it] in the law as it was in this country and in England at the time of the adoption of [the United States Constitution]" (*Thompson* v. *Utah*, 170 U. S. 343, 350). At that time several offenses characterized as "petty" were tried without juries and, in many instances, the maximum term of imprisonment was one year (*District of Columbia* v. *Clawans*, 300 U. S. 617, 624-626). The reasoning underlying these summary trials was as the Supreme Court stated in *Duncan*: "the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications" (*supra*, p. 160).

Recognizing the distinction between "petty" and "serious" offenses, the framers of the New York State Constitution provided that "Trial by jury, in all cases in which it hath heretofore been used in the colony of New York, shall be established and remain inviolate" (N. Y. Const. [1777], art. XLI; see N. Y. Const. [1938], art. I, § 2).

The majority in *Duncan* stated that "the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment. *District of Columbia* v. *Clawans*, 300 U. S. 617 (1937). The penalty authorized by the law of the locality may be taken 'as a gauge of its social and ethical judgments,' 300 U. S., at 628, of the crime in question" (*Duncan* v. *Louisiana*, *supra*, pp. 159-160). It is our opinion that the maximum penalty authorized in the State of New York for a particular crime is not merely a gauge of how the people of our State view that crime, but necessarily answers the question of whether in their judgment it is petty or serious.

In *People* v. *Bellinger* (269 N. Y. 265) the defendant was charged with violating section 359-e (subd. 3) of the General Business Law in that, being a dealer in securities, he failed to file a supplemental dealer's state-

ment. At that time section 359-g provided that the penalties to be imposed for such an act should be "a fine of not more than five thousand dollars, or imprisonment for not more than two years or both".[1] The defendant argued that, although the charge in the information was designated a misdemeanor, in reality it was a felony and necessarily requires prosecution by an indictment and a trial by a jury. In reversing the judgment, this court stated that:

"The meaning of the words 'infamous crime,' which requires indictment by a grand jury and trial by a petty jury of twelve men, has been fairly well understood, during the years of our statehood, as evidenced by the distinction between felonies and misdemeanors outlined by legislative enactment.

* * * *

"The constitutional provision giving a party this right to a trial by jury does not apply to petty offenses tried before a Court of Special Sessions. (*People ex rel. Murray* v. *Justices*, 74 N. Y. 406; *People ex rel. Comaford* v. *Dutcher*, 83 N. Y. 240.) Petty offenses, however, have a well-defined meaning, classified as such by the penalties attached to them. *They cease to be petty when the imprisonment is * * * for a longer term than one year*" (*People* v. *Bellinger*, *supra*, pp. 270-271; emphasis added).

To further evidence that the misdemeanor-felony dichotomy in New York is the same as the petty vs. serious distinction, we need only look at the consequences which necessarily flow from a conviction of a misdemeanor as opposed to a felony.

While it is true that a misdemeanant suffers certain collateral consequences as a result of a conviction, the consequences are not of such a nature so as to render these crimes serious. On the other hand, however, an individual convicted of any felony suffers the very serious

---

[1] Pursuant to the *Bellinger* decision, the Legislature amended section 359-g to provide for punishment "by a fine of not more than five hundred dollars, or imprisonment for not more than one year or both" (L. 1936, ch. 90).

collateral consequences of losing the right to register for or vote at any election (Election Law, § 152), forfeiture of all public offices and suspension of all civil rights (Civil Rights Law, § 79).

We thus conclude that those crimes which are denominated misdemeanors in this State are not crimes to be characterized as serious and, therefore, individuals charged with such crimes need not be afforded the Sixth Amendment's guarantee of a right to a trial by jury.

Having determined that as to appellant Baldwin section 40 of the New York City Criminal Court Act is not rendered unconstitutional by the incorporation of the Sixth Amendment's guarantee of a right to a trial by jury, we must necessarily reach the appellant's second argument that section 40 is violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution.[2]

The appellant contends that defendants charged with misdemeanors in New York City are presently being tried without juries pursuant to section 40, whereas defendants charged with the identical misdemeanors elsewhere in the State do receive the right to a jury trial (UDCA, § 2011; UCCA, § 2011); that such a classification is unreasonable and necessarily violates the equal protection clause of the Fourteenth Amendment. We do not agree.

The Supreme Court has recognized that territorial discrimination as between different states and even as between different parts of the same State is not of itself violative of the equal protection clause, even if the State has no reasonable basis for making such a distinction.

In *Salsburg* v. *Maryland* (346 U. S. 545) the Supreme Court held that the equal protection clause was not violated by a Maryland statute which made evidence obtained by illegal search or seizure generally inadmissible in prosecutions for misdemeanors, but permitted such

---

[2] Appellant does not argue that section 40 violates the equal protection clause under the New York State Constitution (art. I, § 11) because the State Constitution specifically authorizes the Legislature to provide for jury trials in whatever court of the State it chooses (art. VI, § 18).

evidence in prosecutions for certain gambling misdemeanors in one specific county. The court stated: "The Equal Protection Clause relates to equality between persons as such rather than between areas" (*supra*, p. 551). And, therefore: "Whatever may be our view as to the desirability of the classifications, we conclude that the 1951 amendment is within the liberal legislative license allowed a state in prescribing rules of practice" (*supra*, pp. 549-550). The court continued quoting from an opinion in an earlier case which is dispositive of the appellant's present claim of denial of equal protection:

" '[T]here is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. *This would not, of itself, within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the laws.* * * * *It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances*' " (emphasis added).

"The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several States without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same State." (*Missouri* v. *Lewis*, 101 U. S. 22, 31 [1879], quoted at 346 U.S., p. 551, n. 6). (See, also, *Barbier* v. *Connolly*, 113 U. S. 27.)

Even assuming, *arguendo*, the correctness of appellant's underlying premise that territorial discriminations cannot be sustained unless based on a reasonable classification, we would nevertheless reach the same result because it is our opinion that the overburdening caseload existing in the criminal courts of the highly populated City of New York has given rise to extraordinary and unique circumstances which manifests the reasonable basis for making such a distinction.

As the Supreme Court stated in *Missouri* v. *Lewis* (101 U. S. 22, 32, *supra*): "Where part of a State is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions, — trial by jury in one, for example, and not in the other. Large cities may require a multiplication of courts and a peculiar arrangement of jurisdictions. It would be an unfortunate restriction of the powers of the State government if it could not, in its discretion, provide for these various exigencies."

From July, 1966 through December, 1968 the New York City Criminal Court disposed of 321,368 nontraffic misdemeanor cases; whereas in the next largest city, Buffalo, the City Court disposed of 8,189 nontraffic misdemeanor cases. Although it is true that the population of New York City is approximately 15 times as large as Buffalo's, the figures still reflect an enormous disproportion, since New York City's caseload is more than 39 times as great. Moreover, only 78 Judges [3] were available in the New York City Criminal Court to hear those 321,368 misdemeanors whereas in Buffalo there were 12 Judges available to hear the 8,189 misdemeanors, a ratio of 6½ to 1, as compared to the caseload ratio of 39 to 1.[4]

---

[3] Twenty additional Judges have been assigned to the Criminal Court of the City of New York (L. 1968, ch. 987). This, however, should not be viewed as a cure-all; for lack of courtroom space and necessary facilities for these new Judges and the mounting volume of cases continue to cause substantial delays and adversely affect the efficient administration of justice in the Criminal Court of the City of New York.

[4] Statistics supplied by the Office of the State Administrator of the Judicial Conference of the State of New York.

While this alone would suffice as a reasonable basis for not providing for the more time-consuming trial by jury of misdemeanors in the Criminal Court of the City of New York, one need only look to the already existing chaotic calendar conditions and delays in those courts and other courts of the City of New York, due to the constant increase in volume of cases, to find further justification for the territorial discrimination.

Accordingly, the judgment appealed from should be affirmed.

In *Matter of Hogan* v. *Rosenberg*, the companion case to *People* v. *Baldwin*, the precise question raised in *Baldwin* is raised again. The cases, however, are factually distinguishable in that the defendant in this case is between the ages of 16 and 21 and, therefore, notwithstanding his being charged with a misdemeanor, would be subject to young adult treatment pursuant to article 75 of the Penal Law and as such might receive the maximum four-year reformatory sentence.

On April 10, 1968 the defendant, Marvin Puryear, was arrested and charged with possession of burglar's tools, a class A misdemeanor (Penal Law, § 140.35) and criminal trespass in the third degree (Penal Law, § 140.05) a violation.[5] After a preliminary hearing was held before Judge ROSENBERG, the respondent herein, a motion by the District Attorney, the appellant herein, to add the charge of criminal trespass in the first degree (Penal Law, § 140.15), another class A misdemeanor, was granted. Thereafter Judge ROSENBERG granted the defendant's motion for a jury trial (57 Misc 2d 536), stating that under *Duncan* v. *Louisiana* (391 U. S. 145, *supra*) it is unnecessary to reach the question of whether or not a possible reformatory sentence pursuant to article 75 renders a crime "serious". Judge ROSENBERG held that the possibility of receiving a maximum one year's imprisonment for the class A misdemeanor was enough in itself to render the crimes charged against the defendant "serious", therefore requiring a jury trial.

---

[5] Puryear was arrested and charged with a codefendant. However, the case against that codefendant was subsequently dismissed for reasons unrelated to this proceeding.

By order to show cause, the petitioner-appellant Frank Hogan, as District Attorney of New York County, commenced the instant article 78 proceeding seeking an order prohibiting the enforcement of Judge ROSENBERG'S order and mandating that the trial proceed without a jury. On December 30, 1968 Special Term denied the application and dismissed the petition.

Rejecting the basis of Judge ROSENBERG's decision, Special Term upheld the constitutionality of section 40 to the extent that it prevented jury trials for those persons charged with crimes punishable by imprisonment for not more than one year. The court, however, held that section 40 is unconstitutional to the extent that it denies a jury trial to young adults who face reformatory sentences pursuant to article 75. We do not agree with the latter determination.

Appellant has advanced the argument that the sentencing of a young adult to a reformatory is not punishment at all but rather is purely of a rehabilitative nature and, therefore, should not be considered in determining the petty vs. serious question. It is our opinion that the argument must necessarily fall in light of the Supreme Court's recent decision in *Matter of Gault* (387 U. S. 1), in which Justice FORTAS, speaking for the court, stated:

"Ultimately, however, we confront the reality * * * A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes 'a building with whitewashed walls, regimented routine and institutional hours * * *' Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees and 'delinquents' confined with him for anything from waywardness to rape and homicide.

"In view of this, it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process'" (*supra*, pp. 27-28).

As we have already indicated in the companion case that a crime must be characterized as serious when the authorized punishment includes a possible term of imprisonment in excess of one year, the possibility of a young adult receiving a reformatory sentence creates an anomalous situation. Under the new Penal Law, an adult convicted of a misdemeanor can in no event receive a sentence greater than one year and, therefore, as to him, under the rationale of the companion case, the crime is petty. A young adult, however, convicted of the same crime may, pursuant to article 75, receive a reformatory sentence of four years and, therefore, as to the young adult the crime is serious.

The impact of this conclusion upon the New York City Criminal Court as well as the act under which it operates may be assessed from two viewpoints. In one sense, we could affirm the determination of Special Term that section 40 of the New York City Criminal Court Act is unconstitutional to the extent that it authorizes the prosecution of a young adult who is subject to article 75 without affording the right to a jury trial. This view would require the State to afford jury trials to all persons between the ages of 16 and 21 charged with any crime including any act for which an adult would be subject to a term of imprisonment greater than 15 days (see Penal Law, § 55.10).

Another, and far more realistic, approach is that the rationale of the companion case and the Supreme Court's decision in *Matter of Gault* (*supra*) deprive the New York City Criminal Court of jurisdiction to impose a reformatory sentence on young adults pursuant to article 75, in the absence of legislation authorizing a jury trial in such cases and providing procedural machinery therefor. This view would not only do the least damage to the legislative goal of speedy and efficient processing of prosecutions for minor offenses, but would also base the availability of jury trials upon the act allegedly committed by the defendant rather than his age; thus elimi-

nating the anomaly of treating a crime as petty, when committed by a person over 21, while the same act committed by a young adult is considered to be serious.

Adopting this latter view, we hold that the Criminal Court has jurisdiction to prosecute and convict any defendant, including a young adult, for any misdemeanor and, upon conviction, to impose any and all of the sentences authorized for the particular crime involved, except as provided by article 75.

We conclude, therefore, that as defendant Puryear is still awaiting trial, and can no longer receive a reformatory sentence, a conviction for the crimes charged will in no event subject him to imprisonment for a term greater than one year, and, therefore, he is not entitled to a trial by jury.

Accordingly, in *People* v. *Baldwin* the judgment appealed from should be affirmed. In *Matter of Hogan* v. *Rosenberg* the judgment of Special Term dismissing the petition should be reversed and the petition granted.

BURKE, J. (dissenting). The majority today concludes that a defendant who is exposed to a maximum of one year's imprisonment is not entitled to the opportunity for trial by jury. Because that conclusion is not supported by a fair reading of the United States Supreme Court's decision in *Duncan* v. *Louisiana* (391 U. S. 145), and because the States have an affirmative obligation to safeguard Federal constitutional rights (*Sims* v. *Georgia*, 385 U. S. 538, 544; *South Carolina* v. *Bailey*, 289 U. S. 412, 420), I must respectfully dissent and indicate, by a complete and objective analysis of the rationale of *Duncan*, that defendants Baldwin and Puryear and all others charged with the commission of class A misdemeanors are entitled to a jury trial because such crimes are "serious" within the meaning of that term as used in *Duncan*. The majority opinion begins by concluding that *Duncan* is not "dispositive" of the present cases. To the extent that *Duncan* did not, in so many words, hold that a one-year maximum sentence requires a jury trial, it is not, to that extent, "dispositive". However, adjudications concerning fundamental constitutional rights cannot be premised upon such a narrowly literal

approach, but must rather employ an analysis based upon the principles which underlie and give meaning to narrow holdings. Thus, in *Duncan*, it is clear that the precise holding was limited to a determination that a crime punishable by a maximum of two years' imprisonment is a serious crime and not a petty offense and that, therefore, due process requires that the defendant charged with such a crime must be accorded the opportunity for a jury trial (391 U. S., p. 161-162). But it is equally clear that that conclusion was but the end result of a process of analysis and the decision is constitutionally significant precisely because its process of analysis provides the basis for subsequent adjudication of cases as to which its precise holding is not "dispositive." The *Duncan* opinion itself recognized this proposition when it pointed out that "the definitional task necessarily falls on the courts, which must either pass upon the validity of legislative attempts to identify these petty offenses which are exempt from jury trial or, where the legislature has not addressed itself to the problem, themselves face the question in the first instance." (391 U. S., p. 160.)

The elements of the analytical process were clearly set forth in *Duncan*, as is clear from the majority's lengthy quotation from the opinion. (opn., pp. 212-213). The court specified that, "In determining whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial," reference should be made to "objective criteria, *chiefly the existing laws and practices in the Nation.*" (391 U. S., p. 161; emphasis added.) The majority, however, prefers for obvious reasons to refer only to the existing and past laws and practices *in this State*, obviously a frame of reference at least a bit narrower than referring to "existing laws and practices in the Nation." [1]

[1] It should be noted that, had this narrower reference been used in the *Duncan* case itself, Louisiana could undoubtedly have shown that its people had demonstrated their view of the pettiness of "simple battery" by their longstanding denial of jury trial for a crime in the Louisiana Constitution, even though such crime carried a maximum penalty of two years' imprisonment.

When reference is had in accord with the *Duncan* standard, it is clear that the existing laws and practices in the Nation indicate that a one-year maximum sentence of imprisonment is sufficient to make a crime "serious" so as to require that a defendant exposed to such a sentence be accorded a right to trial by jury. Congress has expressly rejected a simplistic felony-misdemeanor classification as the determinative factor in distinguishing between "serious" and "petty" offenses:

"(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

"(2) Any other offense is a misdemeanor.

"(3) *Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense.*" (U. S. Code, tit. 18, § 1; emphasis added.) It is, therefore, clear that the existing Federal law recognizes that, although not *all* misdemeanors are "serious" crimes, misdemeanors punishable by imprisonment in excess of six months are beyond the "petty" category. (391 U. S., p. 161.) Existing State laws and practices in the Nation similarly indicate that crimes punishable by up to one year in prison are not considered "petty" for purposes of the right to jury trial. As the opinion in *Duncan* noted, in 49 of the 50 States crimes subject to trial without a jury are punishable by a maximum one-year term and, in fact, "*there appear to be only two instances, aside from the Louisiana scheme, in which a State denies jury trial for a crime punishable by imprisonment for longer than six months.*" (391 U. S., p. 161, n. 33.) Indeed, those two instances have since been reduced to one: the denial of trial by jury in *New York City* for crimes punishable by imprisonment for up to one year. The other instance noted by the court in *Duncan* was New Jersey's disorderly conduct offense which, prior to a recent legislative reduction of the maximum sentence to six months (N. J. Stat., Ann., § 2A:169-4, as amd. by N. J. L. 1968, ch. 113), carried a maximum penalty of one year and could be imposed upon conviction without a right to trial by jury. At present, then, the law of 49½ States (New

York City comprising roughly the other half of the State of New York in terms of population) and the Federal law provide a clear-cut answer as to what maximum term of imprisonment indicates the line of demarcation between "petty" and "serious" crimes and the law as to New York City is clearly not in accord with that line of demarcation. Thus, although *Duncan* is not "dispositive" of the present issue in the sense that it did not squarely decide the status of such a one-year maximum, its rationale amply demonstrates that, tested by the *proper* criteria, such a maximum sentence is characteristic of a "serious" crime to the trial of which the right to a jury trial attaches. Should further evidence of that proposition be needed, the internal references in the *Duncan* opinion supply it. At the very point in the opinion at which the court noted that "there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the States" (391 U. S., p. 159), it cited in a footnote (*ibid.*, n. 31) to a series of prior Supreme Court cases dealing with the constitutional right to a trial by jury (*District of Columbia* v. *Clawans*, 300 U. S. 617; *Shick* v. *United States*, 195 U. S. 65; *Natal* v. *Louisiana*, 139 U. S. 621; *Callan* v. *Wilson*, 127 U. S. 540). In none of those cases did the court hold that an offense punishable by a term of imprisonment in excess of six months was a petty offense. In addition, in *Cheff* v. *Schnackenberg* (384 U. S. 373), the court held that an actual sentence of six months' imprisonment for criminal contempt, an offense for which no maximum penalty had been provided, was indicative of a "petty" offense and, therefore, did not require a right to trial by jury. Moreover, in the exercise of its supervisory power over the Federal courts, the court ruled that "sentences *exceeding six months* for criminal contempt may not be imposed by federal courts absent a jury trial or waiver thereof" (384 U. S., p. 380; emphasis added), thereby expressing its judgment as to the term of imprisonment at which an offense ceases to be petty enough to be tried without a jury trial right. In the face of all those indications

as to the proper resolution of the issue in this case, the majority nevertheless reaches a different conclusion by reference to different criteria.

However, tested even by the criteria chosen by the majority, i.e., the traditional and present practices of the State of New York, the conclusion that a maximum sentence of imprisonment of one year provides the line of demarcation between "serious" and "petty" crimes cannot be sustained. There is no equation in the law of this State between the "felony-misdemeanor" dichotomy and the dichotomy between "serious" and "petty" offenses. The reliance upon this dichotomy alone, after the enactment of the new Penal Law in 1967, necessarily dismisses as without significance the legislative classification of "violations" and the subclassifications of "felonies" and "misdemeanors". Without relying on such additional classifications as determinative, it is sufficient to note that an argument can be made with some force that the Legislature has identified petty offenses as those included in the "violations" category and in the category of class B misdemeanors. Even more interesting is the statement that a felony conviction results in "very serious collateral consequences", while a misdemeanor conviction results in "certain collateral consequences" which "are not of such a nature as to render these crimes serious" (opn., pp. 215, 216). The mere fact that the collateral consequences of a felony are dubbed "very serious" does not, without demonstration, indicate that the collateral consequences of a misdemeanor conviction are not *also* serious. Indeed, the brief of the District Attorney in *Matter of Hogan* v. *Rosenberg* candidly appends a long list of the consequences which may or must flow from a misdemeanor conviction and the great majority of them limit or prevent the convicted misdemeanant's engaging in various occupations. (See, e.g., Insurance Law, § 331; Code Crim. Pro., § 554-b; Education Law, §§ 6514, 7108; Civil Service Law, § 50, subd. 4; Judiciary Law, § 504, subd. 6; § 596, subd. 4; § 662, subd. 4; General Business Law, § 74, subd. 2; Penal Law, § 400.00; Waterfront Commission Compact [L. 1953, ch. 882, § 1, as amd.], art. V, § 3, subd. [b]; § 7, subd. [a]; art. VI, § 3, subd.

[e]; § 6, subd. [a]; art. X, § 3, subd. [b]; § 6, subd. [a]; Waterfront Commission Act [L. 1952, ch. 882, § 2, as amd.], § 5-i, subd. 1; § 5-n, subd. 3, par. [b]; § 8; Administrative Code of City of New York, § B-32-10.0 *et seq.*) While the loss of the right to vote or to hold public office is undoubtedly "very serious," it is somewhat difficult realistically to say that the restriction or prohibition of an individual's ability to find gainful employment is not *also* "serious" (if not also "very serious"). In sum, there has been no such clear-cut distinction drawn in this State between the consequences flowing from convictions for felonies and convictions for misdemeanors as would justify the conclusion that the latter are not "serious" crimes for purposes of a right to a jury trial. If it is true, as the majority suggests (opn., pp. 214-215), that the "maximum penalty authorized in the State of New York for a particular crime is not merely a gauge of how the people of our State view that crime, but necessarily answers the question of whether in their judgment it is petty or serious", it is difficult to understand how that judgment is reflected in statutes (UCCA, § 2011; UDCA, § 2011) providing for the right to a trial by jury, outside New York City, for crimes which the majority has concluded they deem to be only "petty." Have the people of this State, through their elected representatives, decided that class A misdemeanors are "serious" when committed in Syracuse or Rochester but that these same misdemeanors are only "petty" when committed in one of the five boroughs of New York City? Is it reasonable to suppose that the people of this State have made a judgment that lines on a map have some mysterious power to transform the "serious" into the "petty" and vice versa? To say the least, it is to be doubted. Thus, reliance on a so-called public gauge of what is "serious" and what is "petty" leads, in fact, to a conclusion opposite to that reached by the majority since that "public gauge", expressed as it is in reference to the entire State except New York City, indicates that misdemeanors generally (and not just class A misdemeanors) are serious enough to require a jury trial. It should also be noted that the recent Constitutional Con-

vention resulted in a proposed revision of the provision relating to the right to a jury trial which would have accorded that right, after January 1, 1970, to all defendants tried for offenses punishable by a term of imprisonment of *more than six months.* (Proposed Constitution, art. I, § 7, subd. b.) Thus, the most recent expression of the judgment of the people of this State, through their elected delegates, is directly contrary to the judgment attributed to them by the majority. Accordingly, whether tested by the proper national criteria indicated by *Duncan* or tested by the narrower New York criteria preferred by the majority, the conclusion is clear that a defendant charged with the commission of a class A misdemeanor is entitled to a jury trial since the authorized sentence indicates that such a defendant is being tried for a "serious" crime. To the extent that section 40 of the New York City Criminal Court Act denies such a defendant the opportunity for a jury trial, it must be deemed unconstitutional and defendant Baldwin's conviction should be reversed and his case remitted to that court (the same conclusion applies to respondent Puryear in *Matter of Hogan* v. *Rosenberg* since he, too, was charged with the commission of class A misdemeanors).

In the companion case, *Matter of Hogan* v. *Rosenberg*, there is also a different and additional reason why the respondent Puryear is entitled to a jury trial. As a person between the ages of 16 and 21, Puryear was exposed, upon conviction, to treatment as a young adult (Penal Law, art. 75) and was, therefore, exposed to the possible imposition of a four-year reformatory sentence. Such an authorized maximum sentence clearly falls within the "serious" category defined by *Duncan* as mandating a right to jury trial *unless* the characterization of the place of incarceration as a "reformatory" somehow decreases the severity of such a sentence. In determining whether that characterization has such an effect, it is important to recognize certain propositions which indisputably apply to reformatory sentences. First, section 75.00 (subd. 2) of the Penal Law, by its terms, provides for a *sentence* for a *crime* which may be used in place of the ordinary

sentence for that crime. Furthermore, the same section provides that such a sentence shall be of unspecified duration and that the court shall not set either a minimum or a maximum term. Section 75.10 provides that the term of such a sentence begins when the young adult is received by the appropriate institution and terminates either upon discharge by the Parole Board or upon completion of the maximum term.[2] Furthermore, there is nothing in article 75 of the Penal Law to prevent a court from using a reformatory sentence simply to impose a more severe penalty on a young adult defendant even though it may be clear that he is incapable of being benefited by reformatory commitment (cf. Correction Law, former art. 7-A, § 203; *People* v. *Wilson*, 17 N Y 2d 40, 45). In sum, then, article 75 of the Penal Law provides for a true penal sentence of indeterminate duration up to a maximum of four years which is applicable only upon conviction of a young adult for a crime. The District Attorney and the Attorney-General argue, however, that the rehabilitative purposes of a reformatory sentence take it out of the category of criminal sentencing and, therefore, remove it from the coverage of *Duncan*. The argument is unavailing on both constitutional and purely practical grounds especially in view of the unequivocal rejection of such an argument in the juvenile delinquency context of *Matter of Gault* (387 U. S. 1, 27): "It is of no constitutional consequence—and of little practical meaning—that the institution to which he is committed is called an Industrial School [or 'Reformatory']." As the majority notes, the rationale of the *Gault* decision is equally applicable to reformatory sentences in New York and the length of such sentences requires that defendants subject to such sentences be afforded the right to a jury trial, as mandated by *Duncan*. As in *People* v. *Baldwin*, it is section 40 of the New York City Criminal Court Act which presently denies

[2] The possibility of earlier discharge by the Parole Board is insufficient to change the character of the sentence since, under *Duncan*, the maximum *authorized* sentence, and not the sentence actually imposed or served, is the relevant factor in the determination as to whether the defendant is entitled to a jury trial.

such a defendant a jury trial. It, therefore, follows that that section, as the locus of unconstitutionality under *Duncan*, must to that extent be struck down (and that is so in the present case *even if* the one-year maximum sentence for a class A misdemeanor is *not* sufficient to constitute it a "serious" crime for purposes of a right to trial by jury). The majority, however, inexplicably *declares* section 40 unconstitutional, but actually *invalidates article 75 sentences in the New York City Criminal Court.* While it is sound judicial policy to go to great lengths to save a legislative act from constitutionality, it is a questionable implementation of that policy to attempt to save a patently defective bit of legislation by emasculating a different and constitutionally sound legislative act. Article 75 of the Penal Law is a substantive provision which merely provides for a sentence which a court may impose upon a particular class of defendants upon conviction for a crime and which does not in any way purport to deal with the procedural incidents of a trial for criminal acts. No party to these appeals has raised any challenge to the constitutionality of article 75 and the majority states no ground upon which to declare it invalid or unusable in the City of New York, while apparently sustaining its use elsewhere in the State. The remedy for the constitutional infirmity *presently contained in section 40 of the New York City Criminal Court Act* is to excise it by holding that jury trials must be accorded to young adult defendants subject to reformatory sentences. The attempt to remedy it by preventing the use of a device made available by legislative enactment, within the power of the Legislature to enact, is to engage in unwarranted judicial legislation. What the majority holding in effect does is to amend article 75 to say that reformatory sentences may be imposed upon young adults convicted of crimes anywhere in the State *except as to such young adults as happen to be tried for crimes and are convicted in the Criminal Court of the City of New York.* Amendment of legislation is quite clearly a function of the Legislature, the body chosen by and immediately responsible to the people of this State for the exercise of its judgment as to the substantive

penalties to be visited upon persons convicted of crimes. The fact that the Constitution has been construed to require that certain *procedural* rights must be accorded to a defendant subject to the application of a particular *substantive* provision (such as a reformatory sentence) in no way impugns the validity or wisdom of that substantive provision. Thus, the mere fact that *Duncan* and *Gault*, when read together, require that a young adult subject to the imposition of a reformatory sentence be accorded the right to a jury trial in no way affects the validity of the statute authorizing the sentence itself. It simply means that the procedural provision preventing such a trial, in this case section 40 of the Criminal Court Act, is to that extent invalid and must be disregarded. Whether or not, in light of the jury trial requirement here recognized even by the majority, reformatory sentences should continue to be authorized is a matter for the Legislature and courts, lacking as they are the benefits peculiar to the legislative process, cannot properly make such a determination. Accordingly, the order below dismissing the petition for a writ of prohibition to prevent Puryear's trial by jury should be affirmed upon the ground that section 40 of the New York City Criminal Court Act, insofar as it denies him a jury trial, is unconstitutional. Furthermore, it should be pointed out that such a holding in no way limits or prevents the impositon of reformatory sentences in that court, but merely requires that a young adult exposed to such a sentence be accorded a right to trial by jury.

Finally, the majority concludes that the statutory denial of a jury trial for misdemeanants tried in New York City does not violate the equal protection clause of the Fourteenth Amendment even though a jury trial is accorded by statute to defendants charged with identical misdemeanors elsewhere in the State. (*Compare* N. Y. City Crim. Ct. Act, § 40, *with* UCCA, § 2011, and UDCA, § 2011.) With this conclusion I cannot agree even though I recognize that precedent such as *Salsburg* v. *Maryland* (346 U. S. 545 [1954]) would apparently sustain the majority's position. *Salsburg's* holding, however, has been undercut at least somewhat by the subse-

quent decision in *Mapp* v. *Ohio* (367 U. S. 643; see *Hall* v. *St. Helena Parish School Bd.*, 197 F. Supp. 649, 658 [1961]) and the decision in *Missouri* v. *Lewis* (101 U. S. 22) is readily distinguishable in that Missouri had provided for appeals (the procedural right at issue in that case) *throughout the State* and had merely provided a different appellate court for appeals from circuit courts in the city of St. Louis and adjoining counties. That decision would be support for the majority's conclusion if Missouri had denied appeals from St. Louis courts while providing for them from courts in all other parts of the State of Missouri. That this was the case is apparent from the *Lewis* opinion itself where the court pointed out that the appellant "Bowman has had the benefit of the right to appeal to the full extent enjoyed by any other member of the profession in other parts of the State." (101 U. S., p. 33.) It is clear here that Baldwin and Puryear have not had and will not have, under the majority's holding, the benefit of a right to jury trial to the full extent enjoyed by any other misdemeanant in other parts of New York State. *Lewis*, therefore, was a case in which there was *no* discrimination and its broad *dicta* as to the constitutionality of territorial discrimination within a State should be regarded as precisely that. As to the current weight of such dicta in cases involving constitutional rights, it should be noted that the court in *Duncan* rather easily rejected the dicta in *Maxwell* v. *Dow* (176 U. S. 581) to the effect that the States could constitutionally abolish jury trials entirely. Furthermore, the viability of territorial discrimination in terms of the equal protection clause is not beyond question in light of its treatment in the recent reapportionment cases (*Baker* v. *Carr*, 369 U. S. 186; *Reynolds* v. *Sims*, 377 U. S. 533). With specific reference to equal protection in the context of the criminal law, the Supreme Court has stated that "[b]oth equal protection and due process emphasize the central aim of our judicial system—*all* people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" (*Griffin* v. *Illinois*, 351 U. S. 12, 17; emphasis added.)

Similarly, in *Baxstrom* v. *Herold* (383 U. S. 107), that court held that it was a denial of the equal protection of the laws to deny a jury trial on the issue of the mental status of a defendant nearing the end of a criminal sentence when such a jury trial was accorded to all others civilly committed: "It follows that the State, *having made this substantial review proceeding generally available on this issue, may not,* consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily withhold it from some." (383 U. S., p. 111; emphasis added.) In the present case, the State of New York, having made jury trials generally available for misdemeanors, cannot, consistent with the equal protection clause of the Fourteenth Amendment, withhold it from some defendants because of the purely fortuitous circumstance that they are tried in New York City rather than in Buffalo, Syracuse or any other locality outside the City of New York. The discrimination which is evident in the present New York scheme "cannot be whistled down the wind with the statement that court business must go on, that dockets must be cleared, or that the requirements of jury service should not be expanded to the loss of the citizen in his private affairs." (*Clawans* v. *District of Columbia*, 84 F. 2d 265, 269, affd. on other grounds 300 U. S. 617.) Accordingly, both Baldwin and Puryear are also entitled to a jury trial since the denial of that right to them constitutes a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment. It should also be noted that the majority's holding in preventing the use of reformatory sentences in the Criminal Court of the City of New York, in addition to constituting unwarranted judicial legislation, involves an invidious discrimination against young adults tried in that court in violation of the equal protection clause of the Fourteenth Amendment. In effect, the majority would impose such an invidious discrimination, a discrimination which the Legislature has not made, precisely because the court recognizes that, without such discrimination, such young adults would have jury trials pursuant to the due process clause. It is ironic indeed that a finding that such persons are entitled to one con-

stitutional right results in their being deprived of another and equally valuable constitutional right. The circle thus resulting is both vicious and unnecessary and simply underlines the simplicity and reasonableness of the indicated result, i.e., that such young adults should be accorded the right to a jury trial, at the conclusion of which (assuming a conviction) the discretionary reformatory sentence, as authorized by the Legislature, could be imposed.

Accordingly, in *People* v. *Baldwin* the judgment appealed from should be reversed. In *Matter of Hogan* v. *Rosenberg* the judgment dismissing the petition for a writ of prohibition should be affirmed.

In *Matter of Hogan* v. *Rosenberg*:

Chief Judge FULD and Judges BERGAN, BREITEL and JASEN concur with Judge SCILEPPI; Judge BURKE dissents and votes to affirm in an opinion in which Judge KEATING concurs.

Judgment reversed, without costs, and matter remitted to Special Term for further proceedings in accordance with the opinion herein.

In *People* v. *Baldwin*:

Chief Judge FULD and Judges BERGAN, BREITEL and JASEN concur with Judge SCILEPPI; Judge BURKE dissents and votes to reverse in an opinion in which Judge KEATING concurs.

Judgment affirmed.

SUPREME COURT OF THE UNITED STATES

No. 1875 Misc., October Term, 1968

ROBERT BALDWIN, APPELLANT

v.

NEW YORK

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—June 2, 1969

ON CONSIDERATION of the motion for leave to proceed in forma pauperis herein,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

SUPREME COURT OF THE UNITED STATES

No. 1875 Misc., October Term, 1968

ROBERT BALDWIN, APPELLANT

v.

NEW YORK

APPEAL from the Court of Appeals of the State of New York.

ORDER NOTING PROBABLE JURISDICTION—June 2, 1969

The statement of jurisdiction in this case having been submitted by the Court, probable jurisdiction is noted and the case is transferred to the appellate docket as No. 1472 and placed on the summary calendar.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 356399 13

PREME COURT

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 188

ROBERT BALDWIN,

Appellant,

vs.

NEW YORK,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLANT

WILLIAM E. HELLERSTEIN
The Legal Aid Society
100 Centre Street
New York, New York 10013

Counsel for Appellant

Of Counsel:

LEON B. POLSKY
ALICE DANIEL

INDEX

SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	2
The Constitutional and Statutory Provisions Involved	3
Questions Presented	4
Statement of the Facts of the Case	5
Summary of Argument	8
Argument	
I. Section 40 of the New York City Criminal Court Act Violates the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment by Prohibiting Jury Trials for Crimes Punishable by One Year's Imprisonment	10
A. Under the Criteria of *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), a Crime Punishable by a Year's Imprisonment Is a Serious Crime Requiring a Jury Trial	10
B. Even by the Erroneous, More Restrictive Criteria applied by the Court of Appeals, a Crime Such as Jostling Is Serious Enough to Require a Trial by Jury	16
C. Not Only Are the Conditions to Be Found in New York City's Criminal Courts improper Grounds for Denying the Right to Jury Trial, They Constitute Compelling Justification for Its Provision	29

Page

II. Section 40 of the New York City Criminal Court Act Violates the Equal Protection Clause of the Fourteenth Amendment by Denying Defendants Charged With Misdemeanors in New York City the Jury Trial Which Is Granted to Defendants Charged With the Same Crimes in All Other Parts of the State 40

Conclusion 46

Appendix A: Survey of Jury Trial Laws and Practices in the Nation

Appendix B: Breakdown of the New York Penal Law by Category of Crime

Appendix C: Survey of Collateral Consequences From Conviction of a Misdemeanor in New York

Table of Authorities

CASES:

Baker v. *Carr*, 369 U.S. 186 (1962) 7
Barsky v. *Bd. of Regents*, 305 N.Y. 89, 111 N.E. 2d 222 (1953), aff'd, 347 U.S. 442 (1954) 27
Baxstrom v. *Herold*, 383 U.S. 107 (1966) 7, 31, 44
Bloom v. *Illinois*, 391 U.S. 194 (1968) 13, 16, 22
Callan v. *Wilson*, 127 U.S. 540 (1888) 12, 19, 20, 21
Carafas v. *LaVallee*, 391 U.S. 234 (1968) 26
Carrington v. *Rash*, 380 U.S. 89 (1965) 44
Cheff v. *Schnackenberg*, 384 U.S. 373 (1966) 15, 20, 22
Coates v. *United States*, 290 Fed. 134 (4th Cir. 1923) 16
Danner v. *State*, 89 Md. 220, 42 Atl. 965 (1899) 21
DeStefano v. *Woods*, 392 U.S. 631 (1937) 11, 31

Page

District of Columbia v. *Clawans*, 300 U.S. 617 (1937) 11, 14, 15
District of Columbia v. *Colts*, 282 U.S. 63 (1930) 11-12, 20
Douglas v. *California*, 372 U.S. 353 (1963) 31, 40
Duncan v. *Louisiana*, 391 U.S. 145 (1968) 2, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 19, 31, 39, 40, 42, 44
Dyke v. *Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968) 15, 22

Ex Parte Higashi, 17 Hawaii 428 (1906) 16
Ex Parte Milligan, 71 U.S. 2 (1866) 30

Fay v. *Noia*, 372 U.S. 391 (1963) 31
Fiswick v. *United States*, 329 U.S. 211 (1946) 26
Frank v. *United States*, 395 U.S. 147 (1969) 11, 15, 20

Gideon v. *Wainwright*, 372 U.S. 335 (1963) 31
Gilbert v. *California*, 388 U.S. 263 (1967) 31
Green v. *United States*, 356 U.S. 165 (1958) 31
Griffin v. *Illinois*, 351 U.S. 12 (1956) 7, 31, 40, 44, 45

Hall v. *St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La., 1961), aff'd, 368 U.S. 515 (1962) 42
Harper v. *Virginia Board of Electors*, 383 U.S. 663 (1966) 43, 45
Hernandez v. *Texas*, 347 U.S. 475 (1954) 14
Hill v. *Texas*, 316 U.S. 400 (1942) 32

In re Clancy, 112 Kan. 247, 210 Pac. 487 (1922) 16
In re Fauldan, 20 D.C. Rep. (9 Mackey) 433 (1892) 21

Johnson v. *New Jersey*, 384 U.S. 719 (1966) 31

Labat v. *Bennett*, 365 F. 2d 698 (5th Cir. 1966), cert. den. 386 U.S. 991 (1967) 14
Linkletter v. *Walker*, 381 U.S. 618 (1965) 31

	Page
Mapp v. *Ohio*, 367 U.S. 643 (1961)	42
Matter of Dorf v. *Fielding*, 20 Misc. 2d 18, 197 N.Y.S. 2d 280 (Sup. Ct. 1948)	27
Matter of Hogan v. *Rosenberg*, 58 Misc. 2d 585, 296 N.Y.S. 2d 584 (Sup. Ct. 1968)	2
Matter of Hogan v. *Rosenberg*, 24 N.Y. 2d 207, 247 N.E. 2d 260 (1969), appeal docketed *sub nom. Puryear* v. *Hogan*, No. 2199 Misc., Oct. Term, 1968	1
Matter of Manigo v. *New York City Housing Authority*, 51 Misc. 2d 829, 273 N.Y.S. 2d 1003 (Sup. Ct. 1966), aff'd 27 A.D. 2d 803, cert. den. 389 U.S. 1008 (1967)	27
Missouri v. *Lewis*, 101 U.S. 22 (1879)	7, 41, 42, 43
Moore v. *New York*, 333 U.S. 565 (1948)	14
Natal v. *Louisiana*, 139 U.S. 621 (1891)	15
Patton v. *United States*, 281 U.S. 276 (1930)	14
People v. *Albo*, 139 Misc. 852, 250 N.Y.S. 167 (Ct. Spec. Sess. 1931)	24
People v. *Bowdoin*, 57 Misc. 2d 536, 293 N.Y.S. 2d 748 (Crim. Ct. N.Y. Co., 1968)	2, 16
People v. *DeCillis*, 14 N.Y. 2d 203, 199 N.E. 2d 380 (1964)	34
People v. *Donaldson*, —— N.Y. 2d —— (June 12, 1969)	32
People v. *Fuller*, 24 N.Y. 2d 292, 248 N.E. 2d 17 (1969)	32
People v. *Letterio*, 16 N.Y. 2d 307, 213 N.E. 2d 670 (1965), cert. den., 384 U.S. 911 (1966)	26
People v. *Maddaus*, 17 N.Y. 2d 625, 216 N.E. 2d 332 (1966), cert. den., 385 U.S. 905 (1966)	37
People ex rel. Frank v. *McCann*, 253 N.Y. 221, 170 N.E. 898 (1930)	18
People ex rel. Murray v. *Justices*, 74 N.Y. 406, 13 Hun 533 (1878)	18

Page

Reid v. *Covert*, 354 U.S. 1 (1957) 38
Reynolds v. *Sims*, 377 U.S. 533 (1964) 7, 43, 45
Salsburg v. *Maryland*, 346 U.S. 545 (1951) 6, 41, 42, 43
Schick v. *United States*, 195 U.S. 65 (1904) 12, 15, 19, 20
Shapiro v. *Thompson*, 394 U.S. 618 (1969) 43, 46
Sibron v. *New York*, 392 U.S. 45 (1968) 26
Skinner v. *Oklahoma*, 316 U.S. 535 (1942) 40
Stovall v. *Denno*, 388 U.S. 283 (1967) 31
Thompson v. *Utah*, 170 U.S. 343 (1898) 14, 16
Times Film Corp. v. *Chicago*, 365 U.S. 43 (1961) 22
Toth v. *Quarles*, 350 U.S. 11 (1955) 38
United States v. *Barnett*, 376 U.S. 681 (1964) 20
United States v. *Herzog*, 20 D.C. Rep. (9 Mackey) 430 (1892) 16
United States v. *Jackson*, 20 D.C. Rep. (9 Mackey) 424 (1892) 22
United States v. *Wade*, 388 U.S. 218 (1967) 31
White v. *Crooke*, 251 F. Supp. 401 (M.D. Ala. 1966) 14
Whitus v. *Georgia*, 385 U.S. 545 (1967) 14
Williams v. *Rhodes*, 393 U.S. 23 (1968) 44
Winters v. *Beck*, 385 U.S. 907 (1966) 19

CONSTITUTIONAL PROVISIONS:

Constitution of the United States
Sixth Amendment 3
Fourteenth Amendment 3

Constitution of the State of New York
Article I, Section 2 3
Article VI, Section 18 3

Page

STATUTES:

California Penal Code, §689 (West, 1956) 33
Connecticut Statutes Annotated, Title 53, §53-56 (1958) 25
Iowa Code Annotated, Title 35, §709.6 (1946) 25
Kansas Statutes Annotated, Chapter 21, §21-2422 (1964) 25
Louisiana Code of Criminal Procedure, Article 779, as amended, Acts 635 and 647 of 1968 10
Missouri Statutes Annotated, Chapter 560, §560.161 (1957) 25
Nebraska Revised Statutes, Chapter 28, §28-505 (1943) 25
Nevada Revised Statutes, Title 16, §205.270 (1957) 25
New Jersey Statutes Annotated, §2A:169-4, as amended, L. 1968, ch. 113 10
New York City Administrative Code, Ch. 32, §773-a-7.0 27
New York City Criminal Court Act, §40 ..... 3, 34, 40

New York Code of Criminal Procedure
Section
180-a (1) 26
552 26
555(2) 26

New York Judiciary Law, §140-a, as amended, L. 1968, c. 987, 2 McKinney's Sess. Laws 1970 (1968) 34

New York Penal Law of 1909
Section
2 12
722(6) 24

New York Penal Law Section	Page
10.00	13
70.15	4, 5, 13, 24
75.00	2
105.05	21
110.05	22
120.20	21
125.40	23
125.55	21
130.20	21
130.25	23
130.40	23
130.60	21
140.15	21
140.35	21
155.25	21
155.30	25
165.15	21
165.25	4, 5, 24
165.35	23
165.40	22
170.05	22
170.55	23
205.05	22
205.10	23
205.30	22
210.05	22
215.10	22
215.30	22
215.50	22
220.05	22
220.10	23
235.05	22
235.21	22

Page

240.05 22
240.08 22
240.20 23
240.35 23
240.40 23
240.45 23
245.00 23
245.01 23
260.10 22
265.05(3)(5)(6)(9) 22
265.10(1)(2)(4)(5)(7) 22
265.35(1)(2)(4) 22
270.00 23

New York Uniform City Court Act, §2011 ..... 11, 40
New York Uniform District Court Act, §2011 .... 11, 40
Ohio Revised Code Annotated, Title 29, §2907.29 (1953) 25

United States Code
Title 18 U.S.C. §1 12
Title 28 U.S.C. §1257(2) 2
8 Eliz., c. 4 (1565) 25
Larceny Act of 1916, 6 & 7 Geo. 5, c. 50, §14 25

OTHER AUTHORITIES:

American Bar Association Project on Minimum Standards for Criminal Justice, STANDARDS RELATING TO TRIAL BY JURY (Tent. Draft, 1968) 16, 33
4 BLACKSTONE COMMENTARIES (Cooley Ed., 1899) 20, 21, 25, 30
Comment, *Jury Trials in Louisiana—Implications of Duncan*, 39 La. L. Rev. 118 (1968) 10
Criminal Court of the City of New York, ANNUAL REPORT 1967 34
Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065 (1969) 40

Page

Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury*, 39 Harv. L. Rev. 917 (1926) 14, 15, 17, 19, 20, 29
Goebel and Naughton, LAW ENFORCEMENT IN COLONIAL NEW YORK (1944) 18
Horowitz & Neitring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs from Place to Place Within a State*, 15 U.C.L.A. L. Rev. 787 (1968) 43
James, CRISIS IN THE COURTS (1968) 37
Kalven and Zeisel, THE AMERICAN JURY (1966) 20, 33
Katz, *Municipal Courts—Another Urban Ill*, 20 Case West. L. Rev. 87 (1968) 27, 36
Kaye, *Petty Offenders Have No Peers!*, 26 U. Chi. L. Rev. 245 (1959) 15
Kessler, *Judging the Judges*, The Wall Street Journal, Dec. 7, 1967, p. 1, col. 1 ..... 35, 36, 38
Newman, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966) 33
New York Civil Liberties, Union, LEGISLATIVE MEMORANDUM #20 (Feb. 6, 1969) 33, 34, 35
N.Y. Times, Jan. 17, 1969, p. 48, col. 1 (late city ed.) 30
N.Y. Times, Nov. 9, 1968, p. 30, col. 1 (late city ed.) 28
N.Y. Times, Feb. 2, 1969, p. 1, col. 6 (late city ed.) 37
N.Y. Times, Nov. 8, 1968, p. 1, col. 8 (late city ed.) 28
Note: 18 Geo. L.J. 374 (1930) 17
Note: *Pickpocketing, A Survey of the Crime and its Control*, 104 U. Pa. L. Rev. 408 (1955) 25
Perkins, CRIMINAL LAW (1957) 21
Pollock, *Due Process and Jury Trials in State Courts*, 10 Ariz. L. Rev. 492 (1968) 11

Page

The Supreme Court, 1967 Term, 82 Harv. L. Rev. 93 (1968) 11

Practice Commentary, N.Y. Penal Law, 39 McKinney's Consol. Laws (1967)

§110.00 23

§130.20 21

§155.25 21

§165.25 25

§220.05 22

President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts (1967) 36, 37

President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (1967) 35, 36

Proposed Constitution of the State of New York, Art. I, §7b 28

Report of the National Advisory Commission on Civil Disorders (Bantam Ed. 1968) 36

1 Russell on Crime (12th Ed. 1964) 20

State Commission on the Revision of the Penal Law and Criminal Code, Proposed New York Penal Law (1964) 21

1 Stephen, A History of the Criminal Law of England (1883) 20

3 Stephen, A History of the Criminal Law of England (1883) 21

The Autobiography of Malcolm X (Grove Press Ed. 1966) 36

Wright, *The Courts Have Failed the Poor*, N.Y. Times (Magazine) March 9, 1969, p. 26 36

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 188

ROBERT BALDWIN,

Appellant,

vs.

NEW YORK,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLANT

Opinion Below

The majority and dissenting opinions of the New York Court of Appeals are reported at 24 N. Y. 2d 207, 247 N. E. 2d 260 and appear in the printed appendix at pages 25-48. No other opinions have been rendered.[1]

---

[1] Lower court opinions were written, however, in the companion case to appellant's before the New York Court of Appeals. *Matter of Hogan* v. *Rosenberg*, 24 N.Y. 2d 207, 247 N.E. 2d 260 (1969) [App. 25-48], appeal docketed, *sub nom.*, *Puryear* v. *Hogan*, No. 2199, Misc. October Term, 1968. In that case, Judge Rosenberg

Jurisdiction

The judgment of the New York Court of Appeals was entered March 6, 1969 (App. 23).[2] Notice of appeal was filed in the Criminal Court of the City of New York, County of New York, the court possessed of the record, on April 4, 1969. The appeal was docketed on April 8, 1969, and probable jurisdiction was noted by the Court on June 2, 1969. The jurisdiction of the Court is invoked pursuant to Title 28 of the United States Code, Section 1257 (2).

---

of the New York City Criminal Court ruled that *Duncan* v. *Louisiana*, 391 U.S. 145 (1968) mandated a jury trial for a misdemeanor punishable by a year's imprisonment, and granted the defendants' pretrial motion for one. *People* v. *Bowdoin*, 57 Misc. 2d 536, 293 N.Y.S. 2d 748 (Crim. Ct., N.Y. Co. 1968). Seeking prohibition, the People commenced an Article 78 proceeding in Supreme Court, New York County. Denying relief, that court per Justice Streit held that a jury trial was required because one of the defendants was also punishable upon conviction as a Young Adult which would subject him to imprisonment for up to four years (N.Y. PENAL LAW, § 75.00), but he disagreed with Judge Rosenberg's holding that a jury trial was required for a misdemeanor punishable by up to one year's imprisonment. *Matter of Hogan* v. *Rosenberg*, 58 Misc. 2d 585, 296 N.Y.S. 2d 584 (Sup. Ct., N.Y. Co. 1968). A majority of the Court of Appeals agreed that a jury trial was not required for crimes punishable by one year's imprisonment but that a sentence in excess of one year rendered a crime "serious" under *Duncan*. Rather than grant a jury trial for a misdemeanor in such a case, the court ruled that the New York City Criminal Court was without jurisdiction to impose such a sentence (App. 36).

[2] "App." references are to the separate appendix filed pursuant to Rule 36. The appendices to this brief will be cited as "Appendix A," etc.

The Constitutional and Statutory Provisions Involved

United States Constitution, Amendment VI

• • • • •

United States Constitution, Amendment XIV, Section 1

• • • • •

New York State Constitution, Article I, Section 2

"The right to trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever."

New York Constitution, Article VI, Section 18

"Trial by jury is guaranteed as provided in article one of this constitution. The legislature may provide that in any court of original jurisdiction a jury shall be composed of six or of twelve persons and may authorize any court which shall have jurisdiction over crimes and other violations of law, other than crimes prosecuted by indictment, to try such matters without a jury, provided, however, that crimes prosecuted by indictment shall be tried by a jury composed of twelve persons, unless a jury trial has been waived as provided in section two of article one of this constitution."

New York City Criminal Court Act, Section 40

"All trials in the court shall be without a jury. All trials in the court shall be held before a single judge; provided however, that where the defendant has been

charged with a misdemeanor * * * [he] shall be advised that he has a right to a trial in a part of the court held by a panel of three of the judges thereof * * *."

New York Penal Law, Section 70.15. Sentences of imprisonment for misdemeanors and violation.

"1. Class A misdemeanor. A sentence of imprisonment for a class A misdemeanor shall be a definite sentence. When such a sentence is imposed the term shall be fixed by the court, and shall not exceed one year."

New York Penal Law, Section 165.25. Jostling

"A person is guilty of jostling when, in a public place, he intentionally and unnecessarily:

1. Places his hand in the proximity of a person's pocket or handbag; or

2. Jostles or crowds another person at a time when a third person's hand is in the proximity of such person's pocket or handbag.

Jostling is a class A misdemeanor.

Questions Presented

1. Whether Section 40 of the New York City Criminal Court Act violates the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment by prohibiting jury trials for misdemeanors punishable by sentences of one year's imprisonment.

2. Whether Section 40 of the New York City Criminal Court Act violates the Equal Protection Clause of the Fourteenth Amendment by denying defendants charged with misdemeanors in New York City the jury trial which is granted to defendants charged with the same crimes in all other parts of the State.

Statement of the Facts of the Case

On August 11, 1968, appellant, Robert Baldwin, was arraigned in the Criminal Court of the City of New York, New York County, upon a complaint charging him with the crime of "jostling", a class A misdemeanor under New York law punishable by up to one year's imprisonment. N. Y. PENAL LAW §§165.25, 70.15 (App. 1).

The arresting officer's complaint alleged that appellant, acting in concert with one Arthur Bethea, did jostle an unknown female at the Port Authority Bus Terminal on August 10, 1968. Specifically, the complaint alleged that Bethea "did crowd said female and attempted to shield actions of defendant Robert Baldwin who did place his hand in the proximity of unknown female's purse" (App. 1, 2). The court fixed bail at $1000.00 and adjourned the case to August 26, 1968 (App. 4).

On August 26, 1968, prior to trial, appellant's counsel made a motion for a jury trial, which the court denied (App. 7).

At trial, the arresting officer testified that, from the balcony area of the mezzanine in the Port Authority Bus Terminal, he had observed appellant and Bethea descend an escalator stairway, and saw Bethea place himself along-

side an unidentified female while appellant placed himself behind the woman. As they proceeded down the stairway, Bethea turned slightly to the left, and appellant stuck his hand into the woman's purse and removed an unknown sum of money in a loose package (App. 8, 9). After refreshing his recollection from his notes, the officer testified that appellant had only a ten dollar bill in his possession when arrested (App. 10). Finding the officer "a very forthright and credible witness", the trial judge found appellant and Bethea guilty as charged (App. 16). On September 3, 1968, the court sentenced appellant to one year's imprisonment in the New York City Penitentiary at Rikers Island (App. 21).

On January 10, 1969, the Appellate Term of the Supreme Court of the State of New York, First Judicial Department, affirmed appellant's conviction without opinion (App. 22), and on March 6, 1969, the New York Court of Appeals affirmed the judgment of the Appellate Term by a 5 to 2 vote (App. 25-48). The majority rejected appellant's Sixth Amendment and due process contentions on the grounds that *Duncan* v. *Louisiana*, 391 U. S. 145 (1968) did not require a jury trial where punishment for a crime did not exceed one year, and that using the law of the locality as a gauge of its social and ethical judgments, the historical distinction between felonies and misdemeanors drawn by the New York Legislature and the New York courts meant that the People of the State of New York had determined that a misdemeanor, although punishable by as much as one year's imprisonment, was not a serious offense for jury trial purposes (App. 27). The majority's rejection of appellant's equal protection claim was based on this Court's decisions in *Salsburg* v. *Maryland*, 346

U. S. 545 (1954) and *Missouri* v. *Lewis*, 101 U. S. 22 (1879), and the belief that the heavy caseload existing in the criminal courts of New York City had created extraordinary and unique circumstances which furnished a reasonable basis for distinguishing between New York City and all other counties in the State with respect to the right to a jury trial (App. 32, 33).

Judge Burke, joined by Judge Keating in dissent, was of the opinion that class A misdemeanors punishable by up to one year's imprisonment were "serious" crimes within the meaning of that term as used in *Duncan;* that the majority had erred in referring only to the existing and past laws in New York rather than in the nation; and that even applying the restricted criteria of New York practice, a class A misdemeanor was "serious" because the Legislature had provided for a jury trial upon such a charge in every other county of the State. On the equal protection issue, the dissent expressed the view that the holding in *Salsburg* v. *Maryland,* had been undermined by subsequent decisions of the Court[3] and that the State of New York, having made jury trials generally available for misdemeanors cannot, consistent with the Equal Protection Clause, withhold one solely because the crimes was prosecuted in New York City (App. 36-42, 45-48).

---

[3] *Duncan* v. *Louisiana*, 391 U.S. 145 (1968); *Baxstrom* v. *Herold*, 383 U.S. 107 (1966); *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Baker* v. *Carr*, 369 U.S. 186 (1962); *Griffin* v. *Illinois*, 351 U.S. 12 (1956).

Summary of Argument

In *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), this Court held that a State must grant the right to trial by jury to a person charged with a serious crime. As Louisiana was the only State in the country that did not afford a jury trial for a crime punishable by two years' imprisonment, that denial was held to violate the Sixth Amendment. Section 40 of the New York City Criminal Court Act suffers from the same constitutional infirmity because it leaves New York City as the only jurisdiction in the United States in which a person is denied a jury trial for a crime punishable by one year's imprisonment. Because this practice is unique, reference to laws and practices throughout the nation, as required by *Duncan*, renders such a crime serious under the Sixth Amendment.

The court below erred in confining its analysis to consideration of New York's historical experience of denying common law juries for crimes that were not classified as felonies. The right to jury trial was much more restricted in colonial New York than in the other colonies, and New York's practice was as unrepresentative then as it is today. Its historical rationale is particularly inapposite today, because it reflected a colonial aristocracy's lack of concern for the procedural rights of the lower economic and social classes. The felony-misdemeanor distinction which it spawned has been rejected by this Court as a proper method for determining the seriousness of a crime. Moreover, those crimes now punishable by a year's imprisonment, such as jostling, are unlike, and far more serious than those offenses which were regarded as petty by the framers of the Constitution. The historically petty

offenses more closely resemble the crimes now punishable by less than six months' imprisonment under New York law. A variety of statutes attaching collateral consequences to conviction of any misdemeanor, including jostling, is further evidence of their seriousness, and the availability of jury trials for such crimes everywhere in the State except New York City shows that the People of the State do regard such crimes as serious.

Administrative burdens are not a valid consideration in defining vital constitutional rights. Moreover, there is no evidence that requiring jury trials would hamper New York City's criminal court system. In fact, present conditions in the City's criminal courts, typified by hasty trial procedures and low standards of judicial conduct, experienced mainly by the minority residents of the city's ghettos, emphasize an overriding necessity for providing the right to trial by a jury representative of a cross-section of the community.

By denying jury trials in New York City when they are afforded in every other county of the State, the statute violates the Equal Protection Clause of the Fourteenth Amendment. Previous decisions of this Court, erroneously relied on by the court below, do not permit indiscriminate territorial differentiation. Where rights of fundamental importance are concerned, more recent decisions of the Court require that the State show an overriding and compelling interest in their restriction. The right to trial by jury, provided by a State for part of its citizenry, may not be denied to others solely because of the situs of prosecution. Because jury trials in New York City will not unduly burden the city's court system, there is no rational basis

and clearly no compelling interest of a dimension justifying such discrimination against persons prosecuted in New York City.

ARGUMENT

I.

Section 40 of the New York City Criminal Court Act Violates the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment by Prohibiting Jury Trials for Crimes Punishable by One Year's Imprisonment.

A. Under the Criteria of Duncan v. Louisiana, 391 U. S. 145 (1968), a Crime Punishable by a Year's Imprisonment Is a Serious Crime Requiring a Jury Trial.

In *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), the Court observed that in only three jurisdictions—Louisiana, New Jersey and New York City—were persons denied a jury trial though charged with misdemeanors punishable by imprisonment for up to a year.[4] At present, this practice exists only in the five counties that comprise New York City.[5] In New York's remaining fifty-seven counties, a jury trial is provided for persons charged with any mis-

[4] 391 U.S. at 161, N. 33. An up-to-date survey of each State's provisions for jury trials is set forth in Appendix A.

[5] Louisiana, which at the time of *Duncan* denied jury trials for 41 various misdemeanors punishable by more than six months' imprisonment, has since lowered the maximum sentence for 19 of those crimes to six months and has provided for trial by a five-man jury for the remainder. La. Code Crim. Proc., Art. 779, as amended, Acts 635 and 647 of 1968. See, Comment, *Jury Trials in Louisiana—Implications of Duncan*, 39 La. L. Rev. 118, 127 (1968). New Jersey amended its disorderly persons statute by reducing the maximum penalty for crimes under it to six months and $500 fine. N.J. Stat. Ann. §2A:169-4, as amended, L. 1968, c. 113.

demeanor.[6] The Court's earlier observation that "(t)he most extensive elimination of the jury prevails in New York,"[7] thus acquires its greatest import at the current time. While the Court has yet to squarely hold that the Sixth Amendment requires a jury trial for crimes punishable by imprisonment for as long as one year,[8] the guidelines set forth in *Duncan* and the line of precedent upon which they are founded clearly point toward such a holding.[9]

In *Duncan*, the Court rendered applicable to the States, the Sixth Amendment's requirement of trial by jury in all prosecutions for serious as distinguished from petty crimes. It held that "the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee." 391 U. S. at 149. Determination of whether a crime is to be considered serious for Sixth Amendment purposes is to be made primarily by examination of the sentence authorized, which, if severe enough, requires trial by jury. *Ibid.*; see also, *Frank* v. *United States*, 395 U. S. 147, 148 (1969). But where the gravity of the sentence does not itself resolve the "petty-serious" inquiry, the nature of the offense is also to be examined. *District of Columbia* v. *Colts*, 282

---

[6] N.Y. Unif. Dist. Ct. Act, §2011; N.Y. Unif. City Ct. Act, §2011. (six-man jury).

[7] *District of Columbia* v. *Clawans*, 300 U.S. 617, 619 (1937).

[8] See, *DeStefano* v. *Woods*, 392 U.S. 631, 633 (1968).

[9] See *The Supreme Court, 1967 Term*, 82 Harv. L. Rev. 93, 153 (1968); Pollock, *Due Process and Jury Trials in State Courts*, 10 Ariz. L. Rev. 492, 499 (1968).

U. S. 63, 73 (1930); *Schick* v. *United States,* 195 U. S. 65, 68 (1904); *Callan* v. *Wilson,* 127 U. S. 540 (1888).

In deciding whether the length of sentence or the seriousness of other punishment is enough *per se* to require a jury trial, reference is to be made to "objective criteria, chiefly the existing laws and practices in the Nation." *Duncan* v. *Louisiana, supra,* 391 U. S. at 161. Since New York City is the only place in the United States where appellant could have been sentenced to a year's imprisonment without a jury trial, it is clear that the summary practice in the City is out of step with that of every jurisdiction in the country, including the remaining counties of New York State.

Applying national criteria to the two year maximum sentence authorized in *Duncan,* the Court first observed that in the federal system, petty offenses were defined as those punishable by no more than six months' imprisonment and $500 fine. 391 U. S. at 161, referring to 18 U. S. C. §1. The federal statute contains three classifications: an offense punishable by death or imprisonment for a term exceeding one year is a felony; any other offense is a misdemeanor, but only a misdemeanor punishable by six months or less and $500 fine is declared to be a petty offense.

In New York, prior to 1967, the classification scheme was virtually identical to the federal. Crimes punishable by more than a year were felonies; those up to a year, misdemeanors; and those up to six months were deemed violations instead of "petty offenses." N. Y. Penal Law of 1909, §2. Even after the 1967 revision of the Penal Law, the same parallel with the federal statute can be drawn.

Felonies are still punishable by more than one year. Class A misdemeanors have a one year maximum. As six month sentences no longer exist, the provisions comparable to the federal petty offense classification would now be, not the class A misdemeanor, but the class B misdemeanor and the violation, punishable by maximums of three months and fifteen days respectively. N. Y. PENAL LAW, §§10.00, 70.15(2)(4). The class A misdemeanor would thus fall into that class of crimes requiring a jury trial in federal court.

Turning to the practice in the various States, the Court found that Louisiana was alone in authorizing imprisonment for up to two years without a trial by jury, and concluded that "existing laws and practices in the Nation" rendered the crime of simple battery of which Duncan was convicted, a serious crime for Sixth Amendment purposes. 391 U. S. at 161.

The Court's analysis in *Duncan* compels the conclusion that a jury trial is mandated in appellant's case. Just as Louisiana's practice was unique in the nation, New York City stands alone as a place where a one year sentence may be imposed without some form of jury trial.[10]

---

[10] Appellee has consistently asserted that our analysis is defective because a number of States provide for less than a common law jury for crimes punishable by a year's imprisonment, suggesting thereby that reversal of appellant's conviction would require imposition of a common law jury upon the State of New York and would place a considerable number of States in violation of the Sixth Amendment notwithstanding their provision for some form of jury trial (Appellee's Motion to Affirm, pp. 9-11). This argument is no more meaningful now than it was when urged by the State of Louisiana. *Duncan* v. *Louisiana*, 391 U.S. at 158, n. 30. *Duncan* itself imposed no such requirement. Indeed, the Court noted that its decisions interpeting the Sixth Amendment are always subject to reconsideration. *Ibid.*; *Bloom* v. *Illinois*, 391 U.S. 194, 213

The six-month line of demarcation for petty offenses is not an arbitrary one. Historically, with but few exceptions, it characterized those offenses that were triable summarily:

> "The range and severity of punishment in summary trials has been defined by limiting jurisdiction to the imposition of fines up to a hundred pounds and sentences with hard labor up to six months."
>
> Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury*, 39 Harv. L. Rev. 917, 934 (1926).[11]

(1968) (Mr. Justice Fortas, concurring). After the *Duncan* decision, Louisiana itself, in expanding the right to jury trial for crimes punishable by more than six months' imprisonment, concluded that it need only provide some form of jury trial and thus provided for a five-man jury. See fn. 5 *supra*.

Whether the Sixth Amendment right to jury trial is applicable to the States with all of its "bag and baggage" is an issue not presented by this case. It may well be that the consistent efforts of this Court and others to safeguard the jury-selection process furnishes sufficient reason to reconsider prior decisions on the issues of twelve-man composition and unanimity. *Whitus* v. *Georgia*, 385 U.S. 545 (1967) [exclusion of Negroes]; *Hernandez* v. *Texas*, 347 U.S. 475 (1954) [exclusion of Mexican-Americans]; *Labat* v. *Bennett*, 365 F. 2d 698 (5th Cir. 1966), cert. den. 386 U.S. 991 (1967) [exclusion of wage earners]; *White* v. *Crooke*, 251 F. Supp. 401 (M.D. Ala. 1966) [exclusion of women]; see, *Moore* v. *New York*, 333 U.S. 565, 568 (1948) [New York jury selection procedure found not to violate cross-section of community requirement]. Reconsideration of cases such as *Patton* v. *United States*, 281 U.S. 276 (1930) and *Thompson* v. *Utah*, 170 U.S. 343 (1898) need not be urged by appellant in this case. All that appellant requests is that he be entitled to some form of adjudication by his peers. The six-man jury available to every person in New York State outside of New York City is a model easily available.

[11] That some petty offenses were triable summarily which carried sentences ranging from three to twelve months [*District of Columbia* v. *Clawans*, *supra*, 300 U.S. at 626] does not support a conclusion that the concept of petty offense generally known to

Every case decided by this Court which has upheld a classification of an offense as petty has been within the six month upper limit. *Natal* v. *Louisiana*, 139 U. S. 621 (1891); *Schick* v. *United States*, *supra*, 195 U. S. 65; *Cheff* v. *Schnackenberg*, 384 U. S. 373 (1966); *Dyke* v. *Taylor Implement Mfg. Co.*, 391 U. S. 216 (1968); *Frank* v. *United States*, *supra*, 395 U. S. 147. Frequently, specific reference has been made to the six month maximum almost as an historical rule of thumb:

> "[W]e may doubt whether summary trial with punishment of more than six months' imprisonment, prescribed by some pre-revolutionary statutes, is admissible without concluding that a penalty of ninety days is too much."
>
> *District of Columbia* v. *Clawans*, 300 U. S. 617, 627-628 (1937).

> "Moreover, in the late 18th century in America, crimes triable without a jury were for the most part punishable by no more than a six month prison term, although there appear to have been exceptions to this rule."
>
> *Duncan* v. *Louisiana*, *supra*, 391 U. S. at 161.

---

the framers of the Sixth Amendment was anything other than that to which a maximum of six months was attached. As Frankfurter and Corcoran point out, even crimes punishable by more than twelve months were prosecuted without a jury on occasion; e.g., the burning of houses at night, a felony, punishable by transportation for seven years. 39 Harv. L. Rev. at 927, n. 34. Thus, the fact that at common law some crimes were prosecuted summarily although punishable for more than six months proves too much for no one would contend that a crime such as night-time arson would be prosecutable today without a jury trial. See, Kaye, *Petty Offenders Have No Peers!*, 26 U. Chi. L. Rev. 245, 247 (1959).

Where imprisonment for more than six months has been a possibility, the Court has consistently required a jury trial. *Duncan* v. *Louisiana, supra,* 391 U.S. 145; *Bloom* v. *Illinois, supra,* 391 U.S. 194; *Thompson* v. *Utah,* 170 U.S. 343 (1898). And where crimes which would otherwise be regarded as petty have been made punishable by a year's imprisonment, various courts have held that a jury trial was required. *Ex parte Higashi,* 17 Hawaii 428 (1906) [gambling]; *In re Clancy,* 112 Kan. 247, 210 Pac. 487 (1922) [vagrancy]; *United States* v. *Herzog,* 20 D.C. Rep. (9 Mackey) 430 (1892) [gaming]; *Coates* v. *United States,* 290 Fed. 134 (4th Cir. 1923) [viol. of National Prohibition Act].

That "[a] year's imprisonment is no small matter in any person's life" [12] would seem, therefore, to be well established in this Court's prior decisions, the history of petty offenses, and most significantly, in its universality as a cutoff point throughout the country. It is noteworthy that even prior to the decision in *Duncan,* the American Bar Association, in defining the outer limit of petty offenses, recommended adoption of the federal statutory standard of six months and $500 fine. American Bar Association Project of Minimum Standards for Criminal Justice, STANDARDS RELATING TO TRIAL BY JURY (Tent. Draft, 1968) [hereinafter cited as ABA STANDARDS].

B. EVEN BY THE ERRONEOUS, MORE RESTRICTIVE CRITERIA APPLIED BY THE COURT OF APPEALS, A CRIME SUCH AS JOSTLING IS SERIOUS ENOUGH TO REQUIRE A TRIAL BY JURY.

The decision of the majority below was erroneously based upon criteria different from those required by *Dun-*

[12] *People* v. *Bowdoin, supra,* 57 Misc. 2d at 540, 293 N.Y.S. 2d at 752; see fn. 1 *supra.*

can. Instead of referring to the "existing laws and practices in the Nation" (391 U.S. at 161) the majority considered only the historical practices in New York State, which distinguished between petty and serious crimes by classifying the former misdemeanors, and the latter, felonies (App. 28-30).

Provisions for trial by jury varied greatly, however, among the several colonies right up to the time of the framing of the Constitution. Note, 18 Geo. L.J. 374, 375 (1930); Frankfurter and Corcoran, *supra,* 39 Harv. L. Rev. at 936. By comparison with other colonies, New York relied most heavily for its law enforcement on the summary powers of its magistrates. *Id.* at 944. This strong predilection for summary trials in colonial New York is traceable to the lack of concern of the aristocratic power structure for the rights of the lower classes, the persons most likely to be subjected to such summary dispositions:

> "This partiality for summary procedure is not easy to explain, but we are disposed to attribute it to the sharp distinctions in social and economic status which prevailed in the colony. The democracy which royal governors bewailed was a political, not a social democracy; and the generous imitation of various incidents of oligarchical English local administration tended to enhance class differences. That there was a class which supplied much of the criminal business of the province, the records of the eighteenth century leave us in no doubt. Many a defendant in the city and sometimes in the country was a person without substance, but on the general circumstances which led him into the toils of the law the records are mostly silent. Vagrants and slaves are identified, but how the bulk of the group

was recruited can only be surmised. It seems probable that the transported offenders and the indentured servants made considerable contributions. Certainly the passion for common law due process among the propertied was such that the enactment of summary procedures would have been intolerable unless there was an element sufficiently numerous and not *sui juris* to constitute a problem."

Goebel and Naughton, LAW ENFORCEMENT IN COLONIAL NEW YORK 379 (1944).

In 1824, New York retreated from its expansive view of the magistrate's summary powers and jurisdiction, by providing for juries of six in all misdemeanor cases prosecuted outside of New York City. See *People ex rel. Frank* v. *McCann*, 253 N.Y. 221, 225, 170 N.E. 898, 899 (1930). And in 1878, the New York Court of Appeals found that it could discern no rational basis for denying a six man statutory jury to persons prosecuted for misdemeanors in New York City. In *People ex rel. Murray* v. *Justices*, 74 N.Y. 406, 409, 13 Hun 533 (1878) the court stated:

"No reason is perceived why there should be a distinction in respect to the right to demand the statutory jury of six in the Special Sessions between the city of New York and the other counties of the State. The rule should be uniform, and the right of a trial by such a jury at least is more in accordance with the spirit of our laws than a trial by the Court. The distinction between city and county in this regard is incongruous and unjust, but we have no control over the question."

The perpetuation of summary misdemeanor jurisdiction in New York City in section 40 of the New York City Criminal Court Act is little more than a vestige of New York's harsh colonial policies.

New York's historical experience therefore offers little basis for removing a crime punishable by a year's imprisonment from the protections of the Sixth Amendment. It was an experience unrepresentative of the practice throughout the other colonies, and could not have been within the contemplation of the drafters of the Amendment. Given its aristocratic underpinnings, it is not an experience that is relevant to our time and needs.

The inappropriateness of New York's historical experience with limitations on the right to trial by jury[13] as a reason for continuing to deny jury trials in New York City is exceeded only by the analytical inferiority of the felony-misdemeanor distinction upon which it rests, which was relied upon so heavily by the majority below.

Many years ago, this Court rejected such a test as a method for determining, for Sixth Amendment purposes, the seriousness of a particular offense. *Callan* v. *Wilson*, *supra*, 127 U.S. at 549; *Schick* v. *United States*, *supra*, 195 U.S. at 68; Cf. *Winters* v. *Beck*, 385 U.S. 907 (1966) (Mr. Justice Stewart dissenting from the denial of certiorari). Instead, the proper test was declared to be the nature of the offense and the amount of punishment prescribed, rather than its label in the statute books. *Schick* v. *United States*, *supra*, 195 U.S. at 68. The analytical superiority of the *Schick* rule as recently amplified by the emphasis in *Dun-*

[13] For a concise history of New York's magistrate court experience see Frankfurter and Corcoran, *supra*, 39 Harv. L. Rev. at 944-949.

can and *Frank* upon the punishment authorized, is apparent when applied to the structure of the New York Penal Law. Most, if not all of the crimes punishable as class A misdemeanors are foreign to the concept of "petty offenses" as understood by scholars, the framers of the Constitution and this Court.[14]

The petty offenses known to the framers of the Constitution were crimes of a nuisance nature which did not involve serious immorality. Frankfurter and Corcoran, *supra*, 39 Harv. L. Rev. at 983-1019. They involved matters of "small importance," "trifling nuisances," and "disturbances of good order." 1 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 123 (1883). Generally, they were offenses of a regulatory nature, *malum prohibitum* rather than *malum in se*, and were not indictable at common law. *Callan* v. *Wilson*, *supra*, 127 U.S. at 553; *Schick* v. *United States*, *supra*, 195 U.S. at 69; *District of Columbia* v. *Colts*, *supra*, 282 U.S. at 73 (1930); *United States* v. *Barnett*, 376 U.S. 681, 748-750 (1964) (Mr. Justice Goldberg, dissenting); *Cheff* v. *Schnackenberg*, *supra*, 384 U.S. at 390 (Mr. Justice Douglas, dissenting). Classic examples of such offenses were disorderliness, drunkenness, vagrancy and violations of health, safety, trade, fish and game regulations. Kalven and Zeisel, THE AMERICAN JURY 16 (1966); 4 BLACK-

[14] At the very outset of its analysis, the court below erred when it stated that "[a]t common law, misdemeanors, crimes punishable by imprisonment for no more than one year, were not indictable offenses, and as such were not afforded jury trials, but rather were tried by the Magistrate alone" (App. 27). At common law an indictment lay for all kinds of inferior crimes of a public nature that were classified as misdemeanors. 1 RUSSELL ON CRIME 6 (12th Ed. 1964); Frankfurter and Corcoran, *supra*, 39 Harv. L. Rev. at 926.

STONE, COMMENTARIES 279-281 (Cooley Ed. 1899); 3 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 264, 265 (1883).

In contrast, New York's class A misdemeanors include crimes such as conspiracy in the third degree (§105.05);[15] reckless endangerment in the second degree (§120.20); self-abortion in the first degree (§125.55); sexual misconduct (§130.20);[16] sexual abuse in the second degree (§130.60); criminal trespass in the first degree (§140.15); possession of burglar's tools (§140.35);[17] petit larceny (§155.25);[18] theft of services (§165.15); criminal possession of stolen

---

[15] In *Callan* v. *Wilson, supra,* 127 U.S. at 556, although petitioner had been sentenced to only a fine of $25 or 30 days imprisonment for the crime of conspiracy, it was said that the offense of conspiracy being indictable at common law was "an offense of a grave character, affecting the public at large, and we are unable to hold that a person charged with having committed it * * * is not entitled to a jury, when put upon his trial."

[16] The Practice Commentary to the New York Penal Law states that "[t]his section represents the basic crimes of rape * * * and sodomy * * * and includes therefore, all of the higher degrees of each of these crimes." Practice Commentary, N.Y. PENAL LAW §130.20, 39 MCKINNEY'S CONSOL. LAWS (1967).

[17] At common law, burglary was always regarded as a serious felony [Perkins, CRIMINAL LAW 149 (1957)], and the offenses of possession of burglar's tools and criminal trespass are said to be component parts of the crime of burglary. State Commission on the Revision of the Penal Law and Criminal Code, PROPOSED NEW YORK PENAL LAW 347 (1964).

[18] The Practice Commentary states that "petit larceny is, in essence, simply the basic crime of larceny." Practice Commentary, N.Y. PENAL LAW, §155.25, 39 MCKINNEY'S CONSOL. LAWS (1967). At common law it was an indictable offense and not considered petty. 4 BLACKSTONE, COMMENTARIES 229 (Cooley Ed. 1899). Accordingly, the Sixth Amendment right to jury trial has been held to attach. *In re Fauldan,* 20 D.C. Rep. [9 Mackey] 433 (1892); *Danner* v. *State,* 89 Md. 220, 42 Atl. 965 (1899).

property in the third degree (§165.40);[19] forgery in the third degree (§170.05); resisting arrest (§205.30); escape in the third degree (§205.05); perjury in the third degree (§210.05); tampering with a witness (§215.10); tampering with a juror (§215.30); criminal contempt (§215.50);[20] criminal possession of a dangerous drug (§220.05);[21] obscenity (§235.05) and disseminating indecent material to minors (§235.21);[22] riot in the second degree (§240.05); inciting to riot (§240.08); endangering the welfare of a child (§260.10) and possession, manufacture, transportation and use of certain weapons and dangerous instruments [§§265.05 (3)(5)(6)(9), 265.10 (1)(2)(4)(5)(7), 265.35 (1)(2)(4)].

Class A misdemeanors also include every attempted class E felony. N.Y. PENAL LAW, §110.05. Thus, attempts to

---

[19] Receiving stolen goods was a misdemeanor at common law, prosecuted upon indictment and was always triable by a jury. *United States* v. *Jackson*, 20 D.C. Rep. (9 Mackey) 424, 427 (1892).

[20] Compare *Cheff* v. *Schackenberg*, *supra*, 384 U.S. 373 with *Bloom* v. *Illinois*, *supra*, 391 U.S. 194 and *Dyke* v. *Taylor Implement Co.*, *supra*, 391 U.S. 216.

[21] As the Practice Commentary states, "[t]he lowest degree, here defined, is the basic all-inclusive offense, covering possession of any quantity of a narcotic, depressant, stimulant or hallucinogenic drug." Practice Commentary, N.Y. PENAL LAW, §220.05, 39 McKINNEY'S CONSOL. LAWS (1967). The remaining degrees of the crime are felonious on the basis of whether there is an intent to sell or whether the amount possessed is large enough itself to warrant greater punishment without resorting to the use of presumptions.

[22] Since these crimes involve questions under the First Amendment and are thus determinable by reference to contemporary community standards, they may well require a jury trial regardless of the petty-serious distinction. *Times Film Corp.* v. *Chicago*, 365 U.S. 43, 68-69 (1961) (Warren, C.J., dissenting in an opinion joined by Justices Black, Douglas, and Brennan).

commit crimes such as abortion in the second degree (§125.40), rape in the third degree (§130.25), sodomy in the third degree (§130.40), escape in the second degree (§205.10) and criminal possession of a dangerous drug in the third degree (§220.10) can be tried summarily in New York City. Since these crimes if consummated are serious under New York's own definition, and a person must be "on the verge" of committing one of them to be guilty of attempt,[23] the misdemeanor classification accorded attempted class E felonies furnishes little basis for considering them petty.[24]

The crimes under New York law which parallel those cognizable as petty at common law are found in the class B and violation categories, which include offenses such as fortune telling [§165.35 (class B)]; public lewdness [§245.00 (class B)]; unlawfully using slugs in the second degree [§170.55 (class B)]; unlawfully dealing with fireworks [§270.00 (class B)]; criminal nuisance [§240.45 (class B)]; disorderly conduct [§240.20 (violation)]; exposure of a female [§245.01 (violation)]; loitering [§240.35 (violation)]; public intoxication [§240.40 (violation)]. See Appendix B.

---

[23] Practice Commentary, N.Y. PENAL LAW, §110.00, 39 MCKINNEY'S CONSOL. LAWS (1967).

[24] The class A misdemeanors discussed above are only examples of that category. A complete breakdown of the New York Penal Law by category of crime is set forth in Appendix B. What should be most noticeable from our breakdown is that the class A misdemeanor is the most prevalent crime under the Penal Law for while eight categories of crime are defined, about 40% of the conduct defined as criminal is denominated a class A misdemeanor. It includes the lesser degrees of many serious felonies. On the other hand it does not possess the qualities of a regulatory or *malum prohibitum* nature. Serious, morally culpable criminal intent is required for virtually all the crimes of the category as defined in the Penal Law.

The evolution of the crime of jostling itself reflects the contrast drawn between the class A misdemeanor and the class B and violation categories, and shows its seriousness within the structure of New York's Penal Law. Prior to September 1, 1967, jostling was a form of disorderly conduct and carried a six month sentence. N.Y. PENAL LAW OF 1909, §722 (6). Even so, it was regarded as a crime that carried a special stigma. *People* v. *Albo,* 139 Misc. 852, 250 N.Y.S. 167 (Ct. Spec. Sess. 1931). In the Revised Penal Law it was included in Article J, entitled "Offenses Involving Theft" and its punishment raised to one year. N.Y. PENAL LAW, §§165.25, 70.15. By elevating jostling to a class A misdemeanor, the Legislature expressed the view that it should be regarded as far more serious than under prior law:

> "As disorderly conduct under the former Penal Law—an 'offense' not amounting to a 'crime'—jostling was punishable by a prison term of up to six months (§722). If defined as disorderly conduct under the Revised Penal Law, it would be a 'violation', carrying a prison sentence of not more than fifteen days (§§70.15[4], 240.20). The latter penalty would be grossly inadequate for an offense which constitutes the principal weapon against professional pickpockets, who, in New York City, at least, represent a serious menace to the community. In the opinions of many judges, prosecutors and police officials familiar with the pickpocket problem, even the six months maximum sentence of the former Penal Law does not provide sufficient punishment scope, and the three months max-

imum provided for class B misdemeanors by the Revised Penal Law (§70.15[2]) certainly would not."

> Practice Commentary, N.Y. PENAL LAW, §165.25, 39 MCKINNEY'S CONSOL. LAWS OF NEW YORK (1967).

Jostling is one of the several ways in which legislatures have attempted to deal with pickpocketing. See *Note: Pickpocketing: A Survey of the Crime and Its Control,* 104 U. Pa. L. Rev. 408, 419 (1955). Pickpocketing is a form of larceny and was indictable at common law. *Id.* at 409; 4 BLACKSTONE, COMMENTARIES 229-231 (Cooley Ed. 1899). At one time, pickpocketing was a capital offense without benefit of clergy.[25] English law now includes it within the category of larceny from the person,[26] and many States, including New York, treat it in the same fashion, with penalties exceeding one year's imprisonment.[27] Those States which have specific pickpocketing statutes also attach severe penalties to the crime.[28]

In this case the arresting officer actually testified to a consummated grand larceny, by stating that appellant had taken money from a woman's handbag. See N.Y. PENAL LAW §155.30(4). Appellee has acknowledged that although

---

[25] 8 Eliz., c. 4 (1565).

[26] Larceny Act, 1916, 6 & 7 Geo. 5, c. 50, §14.

[27] N.Y. PENAL LAW, §155.30; e.g., CONN. STAT. ANN., Tit. 53, §53-56 (0-5 years); IOWA CODE ANN., Tit. 35, §709.6 (0-15 years); NEV. REV. STAT., Tit. 16, §205.270 (1-10 years); MO. STAT. ANN., Ch. 560, §560.161 (2-10 years); NEB. REV. STAT., Ch. 28, §28-505 (1-7 years).

[28] KAN. STAT. ANN., Ch. 21, §21-2422 (0-4 years); OHIO REV. CODE ANN., Tit. 29, §2907.29 (1-5 years).

appellant "was prosecuted merely for jostling, the evidence against him set forth all the elements of the felony of grand larceny, since there was a taking of property from the person of the complainant—from a handbag which she carried." (Appellee's Motion to Affirm, p. 20).

The seriousness of the crime of jostling can also be seen in the manner in which it is treated elsewhere in New York statutory law. For example, under New York's Code of Criminal Procedure, it is one of the crimes which makes a defendant ineligible for bail pending appeal.[29] Jostling is also included with the felonies as one of the suspected crimes that allow an officer to invoke the "stop and frisk" provisions of the law. N.Y. CODE CRIM. PROC. §180-a(1).

The Court of Appeals buttressed its opinion that a class A misdemeanor is not serious by comparing the collateral disabilities of a felony conviction, such as the loss of the right to vote, forfeiture of all public offices and suspension of civil rights, with those which result from a misdemeanor conviction, which it regarded as less significant. However, the vast number of disabilities which flow collaterally from a misdemeanor conviction cannot be so easily disregarded. It is these disabilities that have previously been said to furnish the reason for distinguishing misdemeanors from mere violations and truly petty offenses. See, *People* v. *Letterio*, 16 N.Y. 2d 307, 312, 313, 213 N.E. 2d 670, 672-673 (1965) (Bergan, J. concurring). Cf. *Sibron* v. *New York*, 392 U.S. 45, 55-57 (1968); *Carafas* v. *LaVallee*, 391 U.S. 234, 237 (1968); *Fiswick* v. *United States*, 329 U.S. 211, 222 (1946).

---

[29] Section 555(2) of the Code of Criminal Procedure forbids the granting of bail pending appeal to one twice convicted of certain crimes listed in section 552 of the Code. Jostling is one of those crimes and appellant is so situated by virtue of his conviction in this case as to make him non-bailable.

Under New York law, a person convicted of a misdemeanor can be barred from obtaining a license for many professions, such as dentistry, pharmacy, optometry and public accountancy. Appendix C at C-3. See *Barsky* v. *Bd. of Regents*, 305 N.Y. 89, 111 N.E. 2d 222 (1953), aff'd, 347 U.S. 442 (1954). Various occupational licensing requirements explicitly distinguish between conviction for a "high misdemeanor" and other misdemeanors, preventing a class A misdemeanant from becoming, *inter alia*, a stevedore, longshoreman, pier superintendent, hiring agent or checker at the Port Authority. Appendix C at C-1. Under New York City's Administrative Code, employment opportunities are severely restricted by a misdemeanor conviction. Many occupations in the City require licenses which are granted in the discretion of a commissioner, who can require that an applicant be "a fit and proper person." Conviction for a misdemeanor has been held a proper ground for a finding of lack of fitness. *Matter of Dorf* v. *Fielding*, 20 Misc. 2d 18, 197 N.Y.S. 2d 280 (Sup. Ct. 1948); N.Y.C. ADMIN. CODE, Ch. 32, §773a-7.0. A person convicted of a misdemeanor can also be barred from public housing. *Matter of Manigo* v. *New York City Housing Authority*, 51 Misc. 2d 829, 273 N.Y.S. 2d 1003 (Sup. Ct. 1966), aff'd, 27 A.D. 2d 803, cert. den. 389 U.S. 1008 (1967).

Since the overwhelming majority of persons who appear in an urban criminal court such as New York's are members of minority groups and the lower economic classes,[30] exclusion from numerous occupational callings and from public housing is, indeed, a serious consequence, perhaps of even greater concern than loss of suffrage or right to

[30] See, Katz, *Municipal Courts—Another Urban Ill*, 20 Case West. L. Rev. 87, 90 (1968).

public office. See, dissenting opinion of Burke, J. (App. 40, 41).

Reliance on the "public gauge" of what is serious or petty under New York standards alone, leads therefore, as Judge Burke stated in his dissent,

> "to a conclusion opposite to that reached by the majority since that 'public gauge', expressed as it is in reference to the entire State except New York City, indicates that misdemeanors generally (and not just class A misdemeanors) are serious enough to require a jury trial." (App. 41, 42)

As noted by Judge Burke, a more recent expression of public opinion is found in the proposed revision of the State constitution, which would have accorded jury trials to all defendants tried for offenses punishable by more than six months' imprisonment. PROPOSED CONSTITUTION OF THE STATE OF NEW YORK, Art. I, §7b (defeated at referendum, November 7, 1968).[21]

Reduced to its essentials therefore the majority's legal analysis rests on the notion that a jury trial is not consti-

---

[21] Article I, section 7b specifically provided that,

> "After January first, nineteen hundred seventy, a defendant shall be tried for all offenses punishable by a term of imprisonment of more than six months but not more than one year, by a jury of not less than six persons, except that such defendant may waive jury trial."

Although the proposed Constitution was defeated, the defeat was due to the more controversial and unrelated portions, primarily those dealing with aid to parochial schools and to the fact that the Constitution was presented to the voters as a single package. N.Y. Times, Nov. 8, 1968, p. 1, col. 8, p. 30, col. 1 (late city ed.); N.Y. Times, Nov. 9, 1968, p. 30, col. 1 (late city ed.).

tutionally required for a misdemeanor prosecuted in New York City and punishable by a year's imprisonment, simply because New York law has never required it. Judge Burke clearly depicted the tautological nature of this criterion:

> "It should be noted that had this narrower reference been used in the *Duncan* case itself, Louisiana could undoubtedly have shown that its people demonstrated their view of the pettiness of 'simple battery' by their longstanding denial of jury trial for a crime in the Louisiana Constitution, even though such crime carried a maximum penalty of two years' imprisonment." (App. 37, fn. 1)

"[T]he historic availability of summary jurisdiction is by no means proof of its desirability in the enforcement of a particular law." Frankfurter and Corcoran, *supra*, 39 Harv. L. Rev. at 982. After *Duncan*, it cannot be deemed an adequate satisfaction of the requirements of the Sixth Amendment.

C. Not Only Are the Conditions to Be Found in New York City's Criminal Courts Improper Grounds for Denying the Right to Jury Trial, They Constitute Compelling Justification for Its Provision.

The majority's final reason for sustaining the statute's denial of a jury trial to appellant was the burden that such a practice would impose on New York City's already crowded criminal court calendars. Such a consideration is an entirely inappropriate reason for withholding a right of such fundamental importance, and it is not an accurate forecast of what would actually occur if jury

trials for class A misdemeanors were ordered.[32] Moreover, rather than detracting from an argument for jury trials, the conditions that abound in our criminal courts today establish their necessity.

Many years ago Blackstone warned against deprecation of the right to jury trial under the guise of expedience:

> "And, however *convenient*, these may appear at first (as doubtless all arbitrary powers well executed, are to most *convenient*), yet let it be again remembered, that delays and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution . . ."
>
> 4 BLACKSTONE, COMMENTARIES 350 (Cooley Ed. 1899).

This Court has said that the right to trial by jury "is not held by sufferance, and cannot be frittered away on any plea of state or ~~political~~ necessity." *Ex Parte Milligan*, 71 U.S. 2, 123 (1866). And as Mr. Justice Black has written,

> "It is undoubtedly true that a judge can dispose of charges . . . faster and cheaper than a jury. But such trifling economies as may result have not generally been thought sufficient reason for abandoning our great

---

[32] The Court of Appeals' view is not shared by three of New York City's five District Attorneys who have publicly stated they were in favor of jury trials in misdemeanor cases. The Kings County prosecutor favored jury trials in all cases involving any period of imprisonment. N.Y. Times, Jan. 17, 1969, p. 48, col. 1 (late city ed.).

constitutional safeguards aimed at protecting freedom and other basic human rights of incalculable value. Cheap, easy convictions were not the primary concern of those who adopted the Constitution and the Bill of Rights. Every procedural safeguard they established purposely made it more difficult for the government to convict those it accused of crimes. On their scale of values justice occupied at least as high a position as economy."

Green v. *United States,* 356 U.S. 165, 216 (1958) (Mr. Justice Black, dissenting).

Indeed, this Court's continuous expansion of the rights of the criminal defendant has concomitantly witnessed the rejection, at every turn, of arguments urging limitations *in the definition* of constitutional rights because of already crowded court dockets and claimed additional burdens upon state and municipal resources. E.g., *Griffin* v. *Illinois,* 351 U.S. 12 (1956); *Fay* v. *Noia,* 372 U.S. 391 (1963); *Gideon* v. *Wainwright,* 372 U.S. 335 (1963); *Douglas* v. *California,* 372 U.S. 353 (1963); *Baxstrom* v. *Herold,* 383 U.S. 107 (1966); *United States* v. *Wade,* 388 U.S. 218 (1967); *Gilbert* v. *California,* 388 U.S. 263 (1967).[33] Because *Duncan*

[33] Whatever considerations have been made as to the burdens upon court calendars have come in the limitation of retroactive application of newly defined constitutional rights. Where this has occurred, consideration of reliance by state officials upon prior decisions of the Court and non-essentiality of the newly declared right to the integrity of the fact finding process have been accorded equal if not greater weight. See, *Stovall* v. *Denno,* 388 U.S. 283 (1967); *Johnson* v. *New Jersey,* 384 U.S. 719 (1966); *Linkletter* v. *Walker,* 381 U.S. 618 (1965); *De Stefano* v. *Woods, supra,* n. 8, 392 U.S. 631.

It is ironic that the most recent example of the rejection of an argument based on court congestion where the right to jury trial

has already established the importance of the right to trial by jury in our constitutional framework, the only proper inquiry in this case is whether a crime punishable by a year's imprisonment is a serious offense within the contemplation of the Sixth Amendment. The nature of New York City's criminal court dockets can shed no light on that issue. The meaning of the Sixth Amendment and Due Process Clause of the Fourteenth does not fluctuate in proportion to the number of persons who seek otherwise justifiable refuge in them. The rights afforded by the Constitution are personal rights "which the State must respect, the benefit of which every person may demand. * * * its safeguards extend to all." *Hill* v. *Texas*, 316 U.S. 400, 406 (1942).

Even if crowded court calendars were a factor that should properly be weighed by the Court in defining a Sixth Amendment right, there is simply no evidence that providing jury trials for persons charged with class A misdemeanors would result in any additional hardship to the city's criminal court system. In every other metropolitan area in the United States, jury trials are provided for crimes punishable by a maximum of a year's imprisonment. Many jurisdictions provide them for crimes pun-

---

was involved comes from the New York Court of Appeals. In *People* v. *Fuller*, 24 N.Y. 2d 292, 248 N.E. 2d 17 (1969), the court held section 208 of the New York Mental Hygiene Law violative of the Equal Protection Clause because it denied a jury trial on the issue of addiction to persons criminally convicted while such right was afforded persons civilly committed under section 206 of the law. In *People* v. *Donaldson*, —— N.Y. 2d —— (not yet officially reported) (June 12, 1969), the court held its decision in *Fuller* was fully retroactive and pointed out that in *Fuller* it had rejected the argument that the many jury trials resulting from its holding justified withholding the protection of the Equal Protection Clause from the many seeking it (Slip op., p. 2).

ishable by even lower maximums. Yet there has been no indication that the availability of a jury trial has adversely affected the court system of any municipality. ABA STANDARDS, *supra*, at 22. This is so primarily because the major fact of life in any urban criminal court is the exceptionally heavy incidence of both guilty pleas and jury trial waivers. See Newman, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3-4 (1966); Kalven and Zeisel, THE AMERICAN JURY, *supra*, at 19.

In California, which provides its citizens with jury trials for all criminal offenses including traffic violations,[34] it is reported that approximately 3% of all misdemeanor trials in the State are actually conducted before a jury, with the figure rising to slightly more than 10% in Los Angeles. *Ibid.* The percentage of jury trials in Detroit's Recorder's Court is reported as a surprisingly low one of 1/10 of 1%. *Id.* at 18, n. 12.[35]

---

[34] CALIF. PENAL CODE, §689 (West, 1956).

[35] A survey conducted by the New York Civil Liberties Union in 1968 of Legal Aid and Public Defender agencies in the largest American cities reveals these percentages of misdemeanor jury trials in the following cities:

Columbus, Ohio—less than 5%
Philadelphia, Pa.—1½%
Minneapolis, Minn.—5%
Pittsburgh, Pa.—5%
Washington, D.C.—15% to 20% of non-felony cases involving punishment of more than six months: 5% to 10% where less than six months.
San Diego, Calif.—30% where punishment over six months; less than 6% where punishment under six months.
San Francisco—.002%

New York Civil Liberties Union, LEGISLATIVE MEMORANDUM #20, pp. 27, 28 (Feb. 6, 1969) [hereinafter referred to as CLU MEMORANDUM #20].

In New York City in 1967, there were 103,706 misdemeanor convictions, many of which were for crimes punishable by no more than six months' imprisonment. Of this number 95,016 or 91.6% were obtained by guilty pleas. Criminal Court of the City of New York, ANNUAL REPORT 1967, 9, 19. Because of the current provision for a three judge trial in all misdemeanor cases if requested by the defendant,[36] much judicial time is consumed on a single case. In 1967, three-judge courts were convened in 11,487 cases. *Id.* at 5. If jury trials were required, the need for a three-judge court would be eliminated, vastly increasing the number of cases triable by the present panel of Criminal Court judges.[37]

---

[36] N.Y. City Crim. Ct. Act, §40. Unanimity is not required for conviction by a three judge court. *People* v. *DeCillis*, 14 N.Y. 2d 203, 199 N.E. 2d 380 (1964).

[37] This fact has led the New York Civil Liberties Union to conclude that only six new judges would be needed to implement a jury trial system, an estimate made before the New York legislature added twenty new judges to the New York City Criminal Court. N.Y. JUDIC. LAW §140-a, as amend. L. 1968, ch. 987, McKINNEY'S SESS. LAWS 1970 (1968). The Union reaches its conclusion in the following manner:

> "Let us assume that in New York City the percentage [of jury trials] would be relatively high, say 25%. Since there were 16,491 misdemeanor trials in New York City during 1967, that would mean approximately 4200 (25% of 16,491) trials would be jury trials.
>
> * * * * *
>
> The actual working day for most criminal court parts is about 5½ hours.
>
> * * * * *
>
> Let us assume that misdemeanor jury trials would take 5 hours as compared with only one hour for nonjury trials. Thus each time a nonjury trial is converted into a jury trial, four extra hours are required. Assuming 4200 such conversions a year, about 16,800 extra work hours would be needed.

That conditions in the New York City Criminal Court, as in lower criminal courts throughout the country, are chaotic, is a fact that cannot be disputed.[38] Indeed, they are an affront to the concept of justice which we believe the people of the State of New York revere. But rather than serving as the excuse for denial of the right to jury trial, these conditions cry out for the establishment of that right.

In New York City, as in other urban areas throughout the nation, the majority of defendants in the criminal courts

---

If jury trials were available, however, the need for three-judge courts would be eliminated and more judicial time would be released. * * *

In Brooklyn Criminal Court, three-judge courts meet 232 days a year. In the Bronx, three-judge courts meet 176 days a year. In Queens, they meet 156 days a year; in Manhattan, 260 days; and in Staten Island, 10.

Thus, three-judge courts in New York City meet for a total of 834 work days a year. Assuming 5½ work hours for each work day, three-judge courts meet for 4,587 work hours each year. But since there are three judges, *each* spends 4,587 hours a year sitting on three-judge courts. If jury trials were available and three-judge courts eliminated, then 9,174 (4,587 × 2) hours of judicial time would become available.

Since jury trials for misdemeanors would require 16,800 additional hours, it follows that 9,174 hours of that requirement could be met by the time released through the elimination of three-judge courts.

Thus, only 7,626 additional hours would be required to institute jury trials for misdemeanors. Assuming each judge works 5½ hours in court for 240 work-days per year, each judge works 1,320 hours in court per year.

If each judge works 1,320 hours in court, and 7,626 additional hours are needed, then no more than 6 additional judges would be needed." (CLU MEMORANDUM #20, *supra*, fn. 35, at 28-30.)

[38] Kessler, *Judging the Judges*, The Wall Street Journal, Dec. 7, 1967, p. 1, col. 1; President's Commission on Law Enforcement and Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY 128, 129 (1967).

are poor and are either Puerto Rican or Negro.[39] Trial procedures bear little resemblance to those usually associated with due process, and are characterized by an informality which would not be tolerated in a felony trial. Speed, not the pursuit of truth, is the watchword.[40] As elsewhere, the belief is pervasive among the impoverished and minority group residents of the City's ghettos who enter the courtrooms of the Criminal Court either as defendants or as relatives and friends of defendants, that justice is dispensed on an assembly-line basis[41] by judges of predominantly white, middle-class backgrounds who are either unaware of their problems, indifferent to them[42] or actually hostile to them.[43] Many of the New York court system's problems are caused by the judges themselves,

---

[39] Wright, *The Courts Have Failed the Poor*, N.Y. Times (Magazine), March 9, 1969, p. 26.

[40] President's Commission on Law Enforcement and Administration of Justice, TASK FORCE REPORT: THE COURTS 30 (1967). Writing of the New York City Criminal Court, one reporter states:

> "At a recent session, Judge (X) kept the calendar moving with the cry, 'Let's go, let's go. I've got to leave here at 12:30 to get to a funeral.' As the judge finished one case and turned to a second, he made certain that the parties involved in a third were handy. 'Stay right where you are, you're next,' he told a waiting policeman. 'We've got seven minutes. Let's go.'" (Kessler, *Judging the Judges, supra*, fn. 38 at p. 1, col. 1 [name in original].)

[41] REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 337 (Bantam Ed. 1968): Wright, *The Courts Have Failed the Poor, supra*, n. 39 at p. 100.

[42] THE CHALLENGE OF CRIME IN A FREE SOCIETY, *supra*, n. 36 at 127, 128; Katz, *supra*, n. 30. 20 Case West L. Rev. at 90-91, 110, 122.

[43] See THE AUTOBIOGRAPHY OF MALCOLM X 149-150 (Grove Press Ed. 1966).

some of whom arrive late and leave early;[44] many of whom have meager legal ability or lack judicial temperament.[45] Even the many qualified and well-intentioned members of the Criminal Court bench are said to become less so because of the nature of the court's work itself:

> "Lawyers and others who observe Criminal Court say that many judges become cynical, bored or weary after years on the bench, that some of them demean rather than uplift the dignity of the proceedings, that many use bail as a punitive weapon and that a decision may depend less on the merits of the case than on the

---

[44] The Hon. Edward R. Dudley, Chief Administrative Judge of the Criminal Court of the City of New York recently criticized the contribution of members of the court to calendar delay by the shortness of their hours. The practices observed by the reporter covering the story referred to instances of judges sitting for 2 hours and 54 minutes and 3 hours and 28 minutes during an entire day with 5 hours and 12 minutes being the longest time spent on the bench by a judge in any of six criminal court parts under observation even though the Rules of the Judicial Conference state that daily sessions of the court shall total not less than six hours. N.Y. Times, Feb. 2, 1969, p. 1, col. 6 (late city ed.).

[45] The author of a recent study of the lower criminal courts has written:

> "If my sampling is a fair indication (I simply sat down in courtrooms selected at random around the country and listened) perhaps half of the trial judges are, for one reason or another, unfit to sit on the bench.
>
> * * * * *
>
> [I]n states like Pennsylvania, New York, Kentucky, Texas, Oklahoma, and Indiana, where court problems are especially acute (lawyers, prosecutors, policemen and judges) complain that my estimate of the percentage of incompetent judges is far too low. James, CRISIS IN THE COURTS 4 (1968).

See, also, TASK FORCE REPORT: THE COURTS, *supra*, at 32; *People* v. *Maddaus*, 17 N.Y. 2d 625, 216 N.E. 2d 332 (1966) (Van Voorhis, J. dissenting), cert. den., 385 U.S. 905 (1966).

judge's mood, his opinion of the lawyers involved or the idiosyncrasies of his personality."

Kessler, *Judging the Judges,* The Wall Street Journal, Dec. 7, 1967, p. 1, col. 1.

The vital function of the jury as a protection against such conditions is a major reason for its revered role in our tradition. This is especially so where the volume of cases is heavy. The presence of a jury assures the defendant of a fresh fact-finding body neither wearied nor case-hardened by the number of cases which have preceded his. That the jury is designed to function in this manner has been frequently observed by the Court:

"On many occasions, fully known to the Founders of this Country, jurors—plain people—have manfully stood up in defense of liberty against the importunities of judges and despite prevailing hysteria and prejudices."

Toth v. *Quarles,* 350 U.S. 11, 18, 19 (1955).

"Trial by jury in a court of law and in accordance with traditional modes of procedure . . . has served and remains one of our most vital barriers to governmental arbitrariness."

Reid v. *Covert,* 354 U.S. 1, 10 (1957).

"Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic

reaction of the single judge he was to have it. Beyond this, the jury trial provision in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges."

Duncan v. *Louisiana, supra,* 391 U.S. at 156.

In sum, the argument that provision for jury trials in class A misdemeanor prosecutions in New York City will impose too great a burden upon the court system should be rejected. It is irrelevant to the meaning of the Sixth Amendment and lacks basis in fact. Even aside from Sixth Amendment considerations, the temporary inconvenience caused by the need to make administrative adjustments will be far outweighed by improvement in the quality of justice dispensed. Trial by jury will insulate a defendant faced with a potential loss of a year's liberty from those aspects of the system that have worn so thin as to have lost that compassion and sensitivity for humanity which are integral to our system of justice. Rather than detracting from the effectiveness of the criminal court system, the presence of a jury will secure to it some of the dignity it must have.

II.

Section 40 of the New York City Criminal Court Act Violates the Equal Protection Clause of the Fourteenth Amendment by Denying Defendants Charged With Misdemeanors in New York City the Jury Trial Which Is Granted to Defendants Charged With the Same Crimes in All Other Parts of the State.

The fundamental importance of the right to trial by jury has been clearly established by *Duncan* v. *Louisiana,* 391 U.S. 145 (1968). Of course, if a sentence of a year's imprisonment renders a crime "serious" within the meaning of the Sixth Amendment, then a jury trial will be required through the Due Process Clause of the Fourteenth Amendment regardless of New York's attempt to justify its territorial discrimination. But even if the Sixth Amendment does not apply, the right to jury trial afforded to all persons charged with misdemeanors outside New York City is still a fundamental right for purposes of the Equal Protection Clause. Cf. *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942); *Griffin* v. *Illinois,* 351 U.S. 12 (1956); *Douglas* v. *California,* 372 U.S. 353 (1963); *Developments in the Law—Equal Protection,* 82 Harv. L. Rev. 1065, 1130-1132 (1969).

Had appellant been accused of the crime of jostling in any city, town or village in the State of New York other than New York City, he would have been entitled to a jury trial under New York law. N.Y. Unif. Dist. Ct. Act, §2011; N.Y. Unif. City Ct. Act, §2011. But section 40 of the New York City Criminal Court Act prohibits jury trials for misdemeanors in the City of New York. The Court of Appeals sustained this discrimination against New York City de-

fendants, stating that it would be constitutional even if there were no reasonable basis for it, but found a basis in the heavy caseload in the City's criminal courts.

A State cannot, however, discriminate among its citizens on geographic grounds alone in granting as important a right as trial by jury, and the caseload of the New York City Criminal Court does not provide a constitutionally sound rationale for approving that discrimination.

Despite *dicta* to the effect that "[t]he Equal Protection Clause relates to equality between persons as such rather than between areas," and that "territorial uniformity is not a constitutional requisite" [*Salsburg* v. *Maryland,* 346 U.S. 545, 551-552 (1954)] the court's reliance on *Salsburg* and its predecessor, *Missouri* v. *Lewis,* 101 U.S. 22 (1879) was misplaced. Such broad language was unnecessary to the disposition of the issue in either of those cases, and its implications have been limited by more recent decisions.

In *Missouri* v. *Lewis,* a statute that provided a different appellate court for appeals from circuit courts in the City of St. Louis and its adjoining counties than for the rest of the State was held not to violate the Equal Protection Clause. The multiplication of courts in a metropolitan area as large as St. Louis, requiring adjustment of appellate jurisdictions, was reasonable and of relatively little harm to litigants. 101 U.S. at 33. No person in any county was denied the right to an appeal. Thus, as the dissent below pointed out, that decision would be support for the majority's conclusion only "if Missouri had denied appeals from St. Louis courts while providing for them from courts in all other parts of the State of Missouri" (App. 46).

In *Salsburg* v. *Maryland,* the Court upheld a statute which rendered illegally seized evidence admissible in

gambling prosecutions in Anne Arundel County, while prohibiting its use in all other counties in the State. The decision was based not only on the broad language in *Missouri* v. *Lewis, supra,* 101 U.S. at 31, permitting territorial variation, but also on the fact that the exclusionary rule was then only a rule of evidence, not constitutionally mandated, about which many jurisdictions were in disagreement. 346 U.S. at 550-551. As long as the exclusionary rule remained a "rule of practice" it was "peculiarly discretionary with the law-making authority." *Ibid.*

Aside from the effect on *Salsburg* of *Mapp* v. *Ohio,* 367 U.S. 643 (1961), which gave the exclusionary rule constitutional dimension, the relevance of *Salsburg* to a case such as this, involving a right that cannot be described as a mere "rule of practice" must be viewed as severely limited. Cf. *Hall* v. *St. Helena Parish School Board,* 197 F. Supp. 649, 658, fn. 29 (E.D. La., 1961), aff'd, 368 U.S. 515 (1962). While the exclusionary rule owes its recently acquired constitutional status to its utility as a means of enforcing the Fourth Amendment, the right to trial by jury has a uniquely cherished place in common law tradition, and has never been regarded as a mere "rule of practice." This Court's decision in *Duncan* v. *Louisiana* rests on the belief that "trial by jury is fundamental to the American scheme of justice." 391 U.S. at 149.

In *Salsburg,* the Court also gave much weight to the desirability of permitting a State to experiment with various methods of dealing with professional gambling, a problem of special severity in Anne Arundel County. In contrast with *Salsburg,* New York's permanent denial of jury trials in New York City is a refusal to experiment with a

mode of trial recognized and highly valued in the rest of the State. *Lewis* and *Salsburg*, therefore, rest on findings of adequate functional justifications for the territorial differences sustained by them and establish only that territorial uniformity is not an *absolute* constitutional requisite. See Horowitz and Neitring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs from Place to Place Within a State*, 15 U.C.L.A. L. Rev. 787, 791-792 (1968).

Recent decisions of the Court also undermine the majority's assumption that a legislature has a free hand to discriminate territorially as long as the classification it makes is reasonable. Where rights of fundamental public importance are involved, geographic or other classifications will no longer satisfy the Equal Protection Clause merely because they have a rational basis.

In *Reynolds* v. *Sims*, 377 U.S. 533 (1964), this was shown by the Court's invalidation of Alabama's geographic apportionment plan, even though the plan was not lacking in rationality. *Id.* at 575. Rather, the Court wrote that "the fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote." *Id.* at 567. In *Harper* v. *Virginia Board of Electors*, 383 U.S. 663 (1966) the poll tax was held to violate the Equal Protection Clause even though it was not totally irrelevant to the purpose of insuring a qualified electorate. *Id.* at 667 (Mr. Justice Black dissenting). And in *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), the Court explicitly rejected the use of the rational basis test where a fundamental right was involved, stating that "any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* govern-

mental interest, is unconstitutional." *Id.* at 634. Cf. *Williams* v. *Rhodes,* 393 U.S. 23, 31 (1968); *Carrington* v. *Rash,* 380 U.S. 89, 92 (1965).

Even when derived from a State Constitution rather than the Sixth Amendment, the right to trial by jury is by its very nature a critical and justly cherished right. See *Duncan* v. *Louisiana, supra,* 391 U.S. at 152-153, 156. Just as a State may not discriminate in granting the right to appeal, though it need not grant it at all [*Griffin* v. *Illinois,* 351 U.S. 12 (1956)], it should not be permitted to discriminate in granting the right to trial by jury by conferring it on some, but not on others solely because of geography. As was stated in *Baxstrom* v. *Herold,* 383 U.S. 107 (1966):

> "It follows that the State, having made this substantial review proceeding generally available on this issue, may not, consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily withhold it from some." (*Id.* at 111.)

In this case, the State of New York has made jury trials available to all persons accused of the crime of jostling (as well as all other misdemeanors), except those in New York City. Yet a person prosecuted in New York City stands in the same posture before the State's bar of justice as his upstate counterpart. Each is charged with violation of the same statute, and prosecuted by the People of the State of New York. Each is subject to the same authorized penalties and collateral consequences. When the interests of two defendants are so identical the Equal Protection Clause is not satisfied where the mode of each man's trial depends on the location in which he is tried:

"Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'"

Griffin v. *Illinois, supra,* 351 U.S. at 17.

"[T]he concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged."

Reynolds v. *Sims, supra,* 377 U.S. at 565.

The Court of Appeals' adherence to a mere "rational basis" test is neither consistent with this Court's more recent exposition of the meaning of the Equal Protection Clause nor responsive to its admonition that,

"The Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are constitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time to be the limits of fundamental rights (citation omitted). Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change."

Harper v. *Virginia Board of Electors, supra,* 383 U.S. at 669.

The "burden-on-the-courts" argument relied on so heavily below as a basis for denying jury trials in New York City, has already been discussed at length in Point I of this brief.

We believe we have shown the argument to be unsubstantiated and therefore, in the context of the Equal Protection Clause, unworthy of being deemed a rational basis for the statute's discrimination against persons in New York City. *A fortiori*, it does not provide the State with a compelling interest justifying the further denial of jury trials in New York City. If any burden actually resulted from requiring jury trials, it would be no more than a financial one, related to the expense of providing additional space and personnel. Although the State has a cognizable interest in economizing, this Court has held that the saving of costs "cannot justify an otherwise invidious classification." *Shapiro* v. *Thompson, supra*, 394 U.S. at 633.

Conclusion

WHEREFORE, for the foregoing reasons, appellant prays the judgment below be reversed.

Respectfully submitted,

WILLIAM E. HELLERSTEIN
The Legal Aid Society
100 Centre Street
New York, New York 10013

Counsel for Appellant

Of Counsel:

LEON B. POLSKY
ALICE DANIEL

APPENDICES

Wherefore, for the foregoing reasons, appellant prays the judgment below be reversed.

Respectfully submitted,

William E. Hellerstein
The Legal Aid Society
100 Centre Street
New York, New York 10013

Counsel for Appellant

Of Counsel:

Leon B. Polsky
Anton Dreier

APPENDIX A

Survey of Jury Trial Laws and Practices in the Nation*

The following twenty-eight states and the federal jurisdiction guarantee a right to trial by jury in any case where a defendant is charged with an offense punishable by more than six months' imprisonment. In each of these jurisdictions, the defendant is entitled to a twelve-man unanimous jury:

ALABAMA: Constitution, Art. 1, §§6, 11; Ala. Code Ann. tit. 7, §264, tit. 13, §§126, 326, 327, 417, 423, 424, 429 (1958), 428 (Supp. 1967), tit. 15, §§321, 327 (1958); *Collins* v. *State,* 88 Ala. 212, 7 So. 260 (1890).

ARIZONA: Constitution, Art. 2, §§23, 24; Ariz. Rev. Stat. §§12-123, 21-102, 22-320, 22-402, 22-425 (1956), 21-103, 22-301 (Supp. 1967); Ariz. R. Crim. P., Rule 300.

CALIFORNIA: Constitution, Art. 1, §7; Cal. Pen. Code Ann. §§1042, 1140 (1956); *Ex parte Wong Yon Ting,* 106 Cal. 296, 39 Pac. 627 (1895); *People* v. *Howard,* 211 Cal. 322, 295 Pac. 333 (1930).

COLORADO: Constitution, Art. II, §§16, 23; Colo. Rev. Stat. Ann. §§39-7-20, 78-7-4 (1963); Colo. R. Crim. P., Rule 23(b).

CONNECTICUT: Constitution, Art. 1, §§8, 19; Conn. Gen. Stat. Ann. §§51-266, 54-82 (1968).

HAWAII: Constitution, Art. 1, §11; Hawaii Rev. Stats. §§635-26, 701-2, 604-8 (Supp. 1968).

IDAHO: Constitution, Art. 1, §§7, 13; Idaho Code Ann. §§1-1406, 18-113 (1948), §2-105 (Supp. 1967).

---

* To a great extent, this survey was compiled by reference to Appendix A of Appellee's brief in *Matter of Hogan* v. *Rosenberg* in the New York Court of Appeals and to Appendix D of the jurisdictional statement in *Puryear* v. *Hogan,* No. 2199, Misc. Oct. Term, 1968.

ILLINOIS: Constitution, Art. II, §§5, 9; Ill. Ann. Stat. ch. 78, §§20, 23 (Smith-Hurd 1966); *People* v. *Lobb*, 17 Ill. 2d 287, 161 N.E. 2d 325 (1959).

INDIANA: Constitution, Art. 1, §13; Ind. Stat. Ann. §§9-1501, 9-1811 (1956), §§4-303, 4-5904 (1968).

KANSAS: Constitution, Bill of Rights, §§5, 10; Kan. Stat. Ann. §§62-1401, 62-1412, 62-1501, 63-101, 63-302, 63-303, 63-305, 63-307 (1964).

MINNESOTA: Constitution, Art. 1, §§4, 6; Minn. Stat. Ann. §§593.01, 633.02, 633.10, 633.12 (1947); *State* v. *Everett*, 14 Minn. 439 (Gil. 330) (1869).

MISSISSIPPI: Constitution, Art. 3, §§26, 27, 31, Art. 6, §171; Miss. Code Ann. §§1428, 1831, 1836, 1839, 2562 (1957), §1604 (Supp. 1964), §1615 (Supp. 1966).

MISSOURI: Constitution, Art. 1, §§18(a), 22(a); Mo. Rev. Stat. §§543.010, 543.200, 543.210, 543.250, 546.390 (1953).

MONTANA: Constitution, Art. 3, §§16, 23, Art. 8, §11; Mont. Rev. Codes Ann. §§11-1602, 11-1603, 11-1702 (1957), §94-116 (1964); Mont. Code Crim. Proc. §§95-302, 95-303, 95-1901(c), 95-1905, 95-1915(a), 95-2004, 95-2005, 95-2006 (1968).

NEBRASKA: Constitution, Art. I, §§6, 11, Art. V, §§16, 18; Neb. Rev. Stat. Ann. §18-205 (1962), §§29-604, 29-605 (1964), §29-601 (Supp. 1967).

NEVADA: Constitution, Art. I, §3; Nev. Rev. Stat. §§4.370, 175.011, 175.021, 175.481, 266.540, 266.550, 266.555 (1967).

NEW JERSEY: Constitution, Art. I, pars. 9, 10; N.J. Stat. Ann. §§2A:3-4, 2A:3-5, 2A:74-1, 2A:74-2, 2A:169-4, as amended, L. 1968, ch. 113.

NEW MEXICO: Constitution, Art. II, §§12, 14; N.M. Stat. Ann. §§36-2-5, 36-5-16, 36-5-17, 36-5-18, 36-12-3, 40A-1-11 (1964).

NORTH DAKOTA: Constitution, Art. I, §§7, 13; N.D. Cent. Code Ann. §§29-17-12, 29-22-14, 33-12-19, 33-12-25 (1960), §§40-18-15, 40-18-16, 40-18-17 (Supp. 1968).

OHIO: Constitution, Art. I, §§5, 10; Ohio Rev. Code Ann. §§2938.06, 2945.17 (1954), §§1913.09, 2945.77 (Supp. 1966).

PENNSYLVANIA: Constitution, Art. I, §§6, 9; Pa. Stat. Ann. tit. 17, §1142; *Commonwealth* v. *Widmeyer,* 149 Pa. Super. 91, 26 A.2d 125 (1942); *Commonwealth* v. *Fugmann,* 330 Pa. 428, 198 Atl. 99 (1938).

SOUTH DAKOTA: Constitution, Art. VI, §§6, 7; S.D. Code §§16-11-32, 16-11-33, 16-11-34, 16-12-9, 23-2-11, 23-44-19, 24-43-20.

TENNESSEE: Constitution, Art. I, §§6, 8, 9; Tenn. Code Ann. §§39-105, 40-2001 (1935), §40-2504 (Supp. 1968); *Memphis* v. *Trigally,* 46 Tenn. 382 (1869); *Woods* v. *State,* 99 Tenn. 182, 41 S.W. 811 (1897).

VERMONT: Constitution, Ch. 1, Arts. 10, 12; Vt. Stat. Ann. tit. 13, §1 (1958); *State* v. *Hirsch,* 91 Vt. 330, 100 Atl. 877 (1916).

WASHINGTON: Constitution, Art. I, §§21, 22; Wash. Rev. Code Ann. §§2.36.050, 3.20.040, 10.49.020 (1961), §§3.50.020, 3.50.280, 3.50.410, 3.66.010, 3.66.060 (Supp. 1967).

WEST VIRGINIA: Constitution, Art. 3, §14; W. Va. Code Ann. §50-18-7 (1966).

WISCONSIN: Constitution, Art. I, §§5, 7; Wis. Stat. Ann. §957.01 (Supp. 1967), §959.01 (1963); *Rothbauer* v. *State,* 22 Wis. 468 (1868).

WYOMING: Constitution, Art. 1, §§9, 10, Art. 5, §§10, 22; Wyo. Stat. Ann. §§5-123, 5-130, 5-133, 5-135, 7-409, 7-420, 7-427, 7-448 (1957).

FEDERAL GOVERNMENT: 18 U.S.C. §1.

The following eight states guarantee a right to trial by jury in any case where a defendant is charged with an offense punishable by more than six months' imprisonment. In each of these states, the defendant is entitled to a *de novo* trial by jury only upon an appeal from a judgment of conviction:

ARKANSAS: Constitution, Art. 2, §§7, 10; Ark. Stat. Ann. §§22-709, 22-737, 26-301, 26-608, 26-612, 26-620, 41-106, 43-1901, 43-1902, 43-2160, 44-210, 44-509 (1964). (No jury provided in municipal courts, which have jurisdiction of misdemeanors carrying a maximum penalty of one year's imprisonment. Upon conviction, the defendant may appeal to the circuit court where he is entitled to a trial *de novo* before a common law jury.)

DELAWARE: Constitution, Art. 1, §§4, 7, Art. 4, §§28, 30; Del. Code Ann. tit. 10, §4519 (1953); Del. Super. Ct. (Crim.) R. 23, 31(a); Del. Code Ann. tit. 10, §§1581, 1681, tit. 11, §§5501, 5601, 5901 (Supp. 1966). (In the Sussex and Kent County Courts of Common Pleas, which have jurisdiction of misdemeanors, a defendant may demand a jury of twelve. In the New Castle County Court of Common Pleas, however, misdemeanors [some of which carry a maximum penalty of as much as seven years' imprisonment] are tried without a jury, the defendant having a right to appeal his conviction to the Superior Court where the matter is tried *de novo* before a jury of twelve.)

MAINE: Constitution, Art. I, §§6, 7; Me. Rev. Stat. Ann. tit. 4, §152 (Supp. 1968), tit. 15, §§1, 451 (1965); Me. R. Crim. P. 23(b), 31(a); *Sprague* v. *Androscoggin*, 104 Me. 352, 71 Atl. 1090 (1908); letter dated December 17, 1968, from Maine Attorney General's office to New York County District Attorney's office. (Maine district courts try misdemeanors—crimes punishable by a sentence of up to one year—without a

jury. A defendant may appeal his conviction to the Superior Court, however, where he is entitled to a common law jury.)

MARYLAND: Constitution, Declaration of Rights, Arts. 5, 21; Md. Ann. Code, Art. 51, §18, Art. 52, §13 (1968), Art. 66-1/2, §§48, 74, 75, 216, 325 (1967), §327 (Supp. 1968); Md. Rules P. 743, 758. (Trial by jury is not afforded in motor vehicle cases in the first instance even though some motor vehicle offenses carry a penalty of up to five years' imprisonment.)

MASSACHUSETTS: Constitution, Pt. 1, Art. XII; Mass. Gen. Laws Ann. ch. 212, §6 (1958), ch. 218, §26 (Supp. 1968), §27 (1958), ch. 234, §26A, 34 (1959), §26B (Supp. 1968), ch. 263, §6 (1959), ch. 278, §18 (1959). (The district courts and the Municipal Court of Boston try, without a jury, all misdemeanors, except conspiracies and libels, and all felonies punishable by up to five years' imprisonment. The sentences imposed by these courts, however, may not exceed two and one-half years and may not be in the penitentiary. Upon appeal to the Superior Court, a defendant is entitled to a trial *de novo* before a jury of twelve.)

NEW HAMPSHIRE: Constitution, Pt. 1, Arts. 15, 16, Pt. 2, Art. 77; N.H. Rev. Stat. Ann. §599.1 (Supp. 1967), §§502-A:11, 502-A:12 (1968). (District and municipal courts try, without a jury, misdemeanors carrying a maximum term of imprisonment of one year. The defendant in these courts has an absolute right of appeal to the Superior Court where he may demand a jury of twelve in his trial *de novo*.)

NORTH CAROLINA: Constitution, Art. I, §13; *State* v. *Emery*, 224 N.C. 581, 31 S.E. 2d 858 (1944); N.C. Gen. Stat. Ann. §§7A-272(a), 7A-196(e), 14-3 (Supp. 1967). (District courts have jurisdiction to try, without a jury, all offenses below the grade of felony. Such offenses

are denominated petty misdemeanors and the maximum sentence which may be imposed is a fine or two years' imprisonment. Upon appeal, the defendant is entitled to a trial *de novo* by a jury of twelve.)

RHODE ISLAND: Constitution, Art. 1, §§10, 15; R. I. Gen. Laws §§9-10-12, 12-3-1, 12-17-1, 12-22-1, 12-22-9 (1956); *State* v. *Nolan,* 15 R.I. 529, 10 Atl. 481 (1887). (There are no juries in the district courts, which have jurisdiction of misdemeanors, i.e., crimes punishable by a fine of up to $500 or imprisonment for up to one year or both. A defendant may appeal his conviction to the Superior Court where he is entitled to a trial *de novo* before a jury of twelve.)

The following fourteen states guarantee the right to trial by jury for the trial of criminal offenses punishable by more than six months' imprisonment. In each case a jury of fewer than twelve jurors is authorized:

ALASKA: Constitution, Art. I, §11; Alaska Stat. Ann., §§11.75.030, 22.15.060, 22.15.150 (1962). (Jury of six in district magistrate's courts which have jurisdiction of misdemeanors punishable by up to one year's imprisonment).

FLORIDA: Constitution, Declaration of Rights, §§3, 11, Art. V, §22; Fla. Stat. §§913.10, 919.09 (1967). (Twelve jurors in capital cases; six jurors in all other cases).

GEORGIA: Constitution, Art. I, §2-105, Art. VI, §2-5101, Art. VI, §2-3601; Ga. Code Ann. §26-101, 27-2506 (1965); Ga. Laws 1890-91, pp. 935, 939. (In county criminal courts, which have jurisdiction of misdemeanors, i.e., cases in which the maximum sentence imposable is a fine of up to $1000 or imprisonment for a term of up to twelve months or both, defendant may demand a jury trial. Depending upon the county, however, a jury ranges in size from five to twelve persons.

The Criminal Court of Atlanta, for example, tries misdemeanors with juries of five. In Hall County the same crimes are tried by juries of twelve.)

Iowa: Constitution, Art. 1, §§9, 10; Iowa Code Ann., §§602.15, 602.25, 602.39, 687.7 (1950). (Jury of six in municipal courts which have jurisdiction of misdemeanors carrying a maximum fine of $500 or imprisonment for one year or both.)

Kentucky: Constitution, §§7, 11, 248; Ky. Rev. Stat. Ann., §§25.010, 25.035, 26.400, 29.015 (1963). (Misdemeanors carrying a maximum penalty of $500 or twelve months' imprisonment are tried in inferior courts by a jury of six.)

Louisiana: La. Code Crim. Proc., Art. 779, as amended, Act 635 of 1968; letter dated December 13, 1968, from the office of the Louisiana Attorney General to the office of the New York County District Attorney. (As a result of the *Duncan* decision, the 1968 Regular Session of the Louisiana Legislature reduced the penalties of some of its misdemeanors to a term of not more than six months' imprisonment. In addition, the Code of Criminal Procedure was amended to provide for a five-member jury trial in all cases where the maximum penalty may exceed six months' imprisonment.)

Michigan: Constitution, Art. I, §§14, 20; Mich. Comp. Laws Ann., §§730.264, 730.267, 730.412, 730.551 (1968). (Defendants may demand a jury of six in city municipal courts which have jurisdiction of misdemeanors carrying a maximum penalty of $500 or one year.)

New York: Constitution, Art. 1, §2, Art. 6, §18a; N.Y. Uniform District Court Act, §2011; N.Y. Uniform City Court Act, §2011. (In counties outside New York City, a defendant may demand a jury of six for the trial of misdemeanors which are punishable by up to one year's imprisonment.)

OKLAHOMA: Constitution, Art. 2, §§19, 20; Okla. Stat. tit. 11, §§958.3, 958.6, tit. 21, §10 (1961). (Jury of six in the county courts and other courts not of record, which have jurisdiction of misdemeanors carrying a maximum penalty of one year's imprisonment.)

OREGON: Constitution, Art. I, §11; Constitution (orig.), Art. VII, §12; Ore. Rev. Stat., §5.110 (Supp. 1967), §§46.040, 46.175, 46.180 (1967). (Jury of six in county courts, which have jurisdiction of all crimes except those carrying the death penalty or life imprisonment. Jury of six in district courts, which have jurisdiction of all misdemeanors wherein the prescribed punishment does not exceed $3000 or one year's imprisonment.)

SOUTH CAROLINA: Constitution, Art. I, §§18, 25, Art. V, §22; S.C. Code, §§15.629.16, 15.629.21 (Supp. 1967). (A jury of six is provided in the county courts, which have jurisdiction of all criminal cases except murder, manslaughter, rape, attempt to commit rape, arson, common law burglary, bribery and perjury. A sentence of up to ten years' imprisonment may be imposed.)

TEXAS: Constitution, Art. 1, §§10, 15, Art. 5, §§15, 16, 17, 29; Tex. Civil Code Ann., Art. 2191 (1964); Tex. Code Crim. Proc., Arts. 4.06, 37.03 (1966). (In the county courts, which have jurisdiction of misdemeanors carrying a maximum sentence of two years' imprisonment, defendants may demand a jury which consists of six persons.)

UTAH: Constitution, Art. I, §§10, 12; Utah Code Ann., §78-46-5 (1953). (Jury of twelve in capital cases and jury of eight in all other criminal cases in the district courts, which have jurisdiction of both felonies and misdemeanors.)

VIRGINIA: Constitution, Art. 1, §§8, 11; Va. Code Ann., §19.1-206 (1960), §§18.1-6, 18.1-9 (1961). (Jury of five

for trial of misdemeanors which carry a maximum penalty of $500 and/or twelve months' imprisonment.)

The following four states guarantee a trial by jury in any case where a defendant is charged with an offense punishable by more than six months' imprisonment. In each of these states, a non-unanimous verdict is authorized:

LOUISIANA: Constitution, Art. 7, §41; La. Code Crim. Proc. Art. 782 (A nine-twelfths verdict is authorized in felony cases.)

OKLAHOMA: Constitution, Art. 2, §§19, 20; Okla. Stat. tit. 11, §§958.3, 958.6, tit. 21, §10 (1961). (In misdemeanor cases, those in which a sentence of up to one year's imprisonment may be imposed, in courts of record, a defendant may demand a jury of twelve; nine members of the jury may render a verdict. For the same crimes tried in courts not of record, the defendant may demand six jurors, five of whom may render a verdict.)

OREGON: Constitution, Art. I, §11; Ore. Rev. Stat. §17.105 (1965). (A jury of twelve in the circuit courts must render a unanimous verdict in cases of murder in the first degree; in all other cases a ten-twelfths verdict is authorized.)

TEXAS: Constitution, Art. 5, §13; Tex. Code Crim. Proc. Art. 37.02 (1966). (In misdemeanor cases tried in the district courts a verdict may be rendered by nine of, or ten of eleven jurors if one or more of the twelve jurors have been discharged after the cause has been submitted to the jury.)

The following is the only jurisdiction in which a defendant charged with an offense punishable by more than six months' imprisonment is denied his right to trial by jury:

NEW YORK CITY: N.Y. Constitution, Art. 6, §18; N.Y.C. Criminal Court Act, §§31, 40.

APPENDIX B

Breakdown of the New York Penal Law by Category of Crime*

Class A Felony	*Penal Law Section*
Murder	125.25
Kidnapping in the first degree	135.25
Class B Felony	
Attempted murder or kidnapping in the first degree	110.05(1)
Manslaughter in the first degree	125.20
Rape in the first degree	130.35
Sodomy in the first degree	130.50
Kidnapping in the second degree	135.20
Burglary in the first degree	140.30
Arson in the first degree	150.15
Robbery in the first degree	160.15
Criminally selling a dangerous drug in the first degree	220.40
Class C Felony	
Conspiracy in the first degree	105.15
Attempt to commit a class B felony	110.05(2)
Criminal facilitation	115.05
Assault in the first degree	120.10
Manslaughter in the second degree	125.15
Rape in the second degree	130.30
Sodomy in the second degree	130.45
Burglary in the second degree	140.25
Arson in the second degree	150.10
Grand larceny in the first degree	155.40

* This breakdown does not include crimes defined outside the Penal Law such as violations of the Vehicle and Traffic Law and Public Health Law.

	Penal Law Section
Robbery in the second degree	160.10
Forgery in the first degree	170.15
Criminally possessing a forged instrument in the first degree	170.30
Criminally possessing a dangerous drug in the first degree	220.20
Criminally selling a dangerous drug in the first degree	220.35
Promoting prostitution in the first degree	230.30
Class D Felony	
Criminal solicitation in the first degree	100.10
Attempt to commit a class C felony	110.05(3)
Assault in the second degree	120.05
Reckless endangerment in the first degree	120.25
Abortion in the first degree	125.45
Rape in the second degree	130.30
Sodomy in the second degree	130.45
Sexual abuse in the first degree	130.65
Coercion in the first degree	135.65
Burglary in the third degree	140.20
Criminal mischief in the first degree	145.10
Grand larceny in the second degree	155.35
Robbery in the third degree	160.05
Criminal possession of stolen property in the first degree	165.50
Forgery in the second degree	170.10
Criminally possessing a forged instrument in the second degree	170.25
Criminally possessing forgery devices	170.40
Tampering with public records in the first degree	175.25
Bribing a labor official	180.15
Bribe receiving by a labor official	180.25
Sports bribing	180.40

	Penal Law Section
Bribery	200.00
Bribe receiving	200.10
Bribe giving for public office	200.45
Bribe receiving for public office	200.50
Escape in the first degree	205.15
Hindering prosecution in the first degree	205.65
Perjury in the first degree	210.15
Bribing a witness	215.00
Bribe receiving by a witness	215.05
Bribing a juror	215.15
Bribe receiving by a juror	215.20
Criminally possessing a dangerous drug in the second degree	220.15
Criminally selling a dangerous drug in the third degree	220.30
Promoting prostitution in the second degree	230.25
Possession of weapons and dangerous instruments	265.05(1)(2)(8)
Manufacture, transport, disposition and defacement of certain weapons and dangerous instruments	265.10(1)(2)(3)(6)
Prohibited use of weapons	265.35(3)

Class E Felony

Conspiracy in the second degree	105.10
Attempt to commit a class D felony	110.05(4)
Promoting a suicide attempt	120.30
Criminally negligent homicide	125.10
Abortion in the second degree	125.40
Rape in the third degree	130.25
Sodomy in the third degree	130.40
Unlawful imprisonment in the first degree	135.10
Custodial interference in the first degree	135.50
Substitution of children	135.55
Criminal mischief in the second degree	145.05

	Penal Law Section
Criminal tampering in the first degree	145.20
Arson in the third degree	150.05
Grand larceny in the third degree	155.30
Unlawful use of secret scientific material	165.07
Criminal possession of stolen property in the second degree	165.45
Unlawfully using slugs in the first degree	170.60
Falsifying business records in the first degree	175.10
Offering a false instrument for filing in the first degree	175.35
Issuing a false certificate	175.40
Sports bribe receiving	180.45
Unlawfully concealing a will	190.30
Criminal usury	190.40
Rewarding official misconduct	200.20
Receiving reward for official misconduct	200.25
Escape in the second degree	205.10
Promoting prison contraband in the first degree	205.25
Bail jumping in the first degree	205.40
Hindering prosecution in the second degree	205.60
Perjury in the second degree	210.10
Making an apparently sworn false statement in the first degree	210.40
Tampering with physical evidence	215.40
Criminally possessing a dangerous drug in the third degree	220.10
Promoting gambling in the first degree	225.10
Possession of gambling records in the first degree	225.20
Riot in the first degree	240.00
Criminal anarchy	240.15
Eavesdropping	250.05
Bigamy	255.15
Incest	255.25

	Penal Law Section
Abandonment of a child	260.00
Prohibited use of weapons	265.35(3)
Class A misdemeanor	
Criminal solicitation in the second degree	100.05
Conspiracy in the third degree	105.05
Attempt to commit a class E felony	110.05(5)
Criminal facilitation in the second degree	115.00
Assault in the third degree	120.00
Reckless endangerment in the second degree	120.20
Self abortion in the first degree	125.55
Sexual misconduct	130.20
Sexual abuse in the second degree	130.60
Unlawful imprisonment in the second degree	135.05
Custodial interference in the second degree	135.45
Coercion in the second degree	135.60
Criminal trespass in the first degree	140.15
Possession of burglar's tools	140.35
Criminal mischief in the third degree	145.00
Petit larceny	155.25
Misapplication of property	165.00
Unauthorized use of a vehicle	165.05
Theft of services	165.15
Fraudulently obtaining a signature	165.20
Jostling	165.25
Fraudulent accosting	165.30
Criminal possession of stolen property in the third degree	165.40
Forgery in the third degree	170.05
Criminal possession of a forged instrument in the third degree	170.20
Criminal simulation	170.45
Falsifying business records in the second degree	175.05
Tampering with public records in the second degree	175.20

	Penal Law Section
Offering a false instrument for filing in the second degree	175.30
Issuing a false financial statement	175.45
Presenting a false insurance claim	175.50
Tampering with a sports contest	180.50
Fraud in insolvency	185.00
Fraud involving a security interest	185.05
Fraudulent disposition of mortgaged property	185.10
Fraudulent disposition of property subject to a conditional sale contract	185.15
False advertising	190.20
Criminal impersonation	190.25
Possession of usurious loan records	190.45
Official misconduct	195.00
Obstructing governmental administration	195.05
Giving unlawful gratuities	200.30
Receiving unlawful gratuities	200.35
Escape in the third degree	205.05
Promoting prison contraband in the second degree	205.20
Resisting arrest	205.30
Bail jumping in the second degree	205.35
Hindering prosecution in the third degree	205.55
Perjury in the third degree	210.05
Making an apparently sworn false statement in the second degree	210.35
Making a punishable false written statement	210.45
Tampering with a witness	215.10
Tampering with a juror	215.25
Misconduct by a juror	215.30
Compounding a crime	215.45
Criminal contempt	215.50
Criminal contempt of the Legislature	215.60
Criminally possessing a dangerous drug in the fourth degree	220.05

	Penal Law Section
Criminally possessing a hypodermic instrument	220.45
Promoting gambling in the second degree	225.05
Possession of gambling records in the second degree	225.15
Possession of a gambling device	225.30
Promoting prostitution in the third degree	230.20
Obscenity	235.05
Disseminating indecent material to minors	235.21
Riot in the second degree	240.05
Inciting to riot	240.08
Disruption, or disturbance of religious service	240.21
Aggravated harassment	240.30
Possession of eavesdropping devices	250.10
Divulging an eavesdropping warrant	250.20
Unlawfully solemnizing a marriage	255.00
Unlawfully issuing a dissolution decree	255.05
Unlawfully procuring a marriage license	255.10
Non-support of a child	260.05
Endangering the welfare of a child	260.10
Endangering the welfare of an incompetent person	260.25
Possession of weapons and dangerous instruments	265.05(3)(5)(6)(9)
Manufacture, transport, disposition and defacement of weapons and dangerous instruments and appliances	265.10(1)(2)(4)(5)(7)
Failure to report a bullet wound	265.25
Prohibited use of weapons	265.35(1)(2)(4)
Violation of firearm licensing provisions	400.00(15)

Class B misdemeanor

	Penal Law Section
Conspiracy in the fourth degree	105.00
Attempt to commit a misdemeanor	110.05(6)
Menacing	120.15
Self-abortion in the second degree	125.50
Issuing abortional articles	125.60
Consensual sodomy	130.38
Sexual abuse in the third degree	130.55
Criminal trespass in the second degree	140.10
Criminal tampering in the second degree	145.15
Reckless endangerment of property	145.25
Fortune telling	165.35
Unlawfully using slugs in the second degree	170.55
Commercial bribery	180.00
Commercial bribe receiving	180.05
Rent gouging	180.55
Issuing a bad check	190.05
Misconduct by corporate official	190.35
Refusing to aid a peace officer	195.10
Obstructing firefighting operations	195.15
Criminal contempt of a Temporary State Commission	215.65
Unlawful grand jury disclosure	215.70
Unlawful disclosure of indictment	215.75
Permitting prostitution	230.40
Unlawful assembly	240.10
Criminal nuisance	240.45
Falsely reporting an incident	240.50
Public lewdness	245.00
Failure to report wiretapping	250.15
Tampering with private communication	250.25
Unlawful obtaining communications information	250.30
Failure to report criminal communications	250.35
Adultery	255.17

	Penal Law Section
Unlawfully dealing with a child	260.20
Unlawfully dealing with fireworks	270.00
Unlawfully possessing noxious material	270.05
Creating a hazard	270.10
Unlawfully refusing to yield a party line	270.15
Violation	
Criminal solicitation in the third degree	100.00
Criminal trespass in the third degree	140.05
Unlawfully posting advertisements	145.30
Disorderly conduct	240.20
Harassment	240.25
Exposure of a female	245.01
Promoting the exposure of a female	245.02
Offensive exhibition	245.05
Patronizing a prostitute	230.05
Prostitution*	230.00
Loitering	240.35
Public intoxication	240.40

* Raised to a class B misdemeanor, L. 1969, ch. 169, eff. Sept. 1, 1969, McKinney's Sess. L. p. 186 (1969).

APPENDIX C

Survey of Collateral Consequences From Conviction of a Misdemeanor in New York*

I. The following collateral consequences accrue as a result of conviction of a "crime", a misdemeanor or of certain specified misdemeanors. "Crime" in New York includes felonies and misdemeanors. N. Y. PENAL LAW, §10.00; *Barsky* v. *Board of Regents*, 305 N.Y. 89 (1953), aff'd, 347 U.S. 442 (1954).

(A) Denial, revocation or suspension of the following licenses resulting from conviction of a "high misdemeanor" or one of the specified misdemeanors which include illegal possession of a dangerous weapon, possession of burglar's tools, buying or receiving stolen property, unlawful entry of a building, unlawful possession of drugs, aiding escape from prison, etc.:

Pier Superintendent, Hiring Agent	N.Y. Unconsol. Laws, §§9814(b), 9818(a)
Stevedores	N.Y. Unconsol. Laws, §§9821(e), 9824(a)
Longshoremen	N.Y. Unconsol. Laws, §§9829(a), 9831(a)
Port Watchmen	N.Y. Unconsol. Laws, §§9841(b), 9844(a)
Checkers	N.Y. Unconsol. Laws, §§9918(3) (b), (5a)

* To a great extent, this survey was compiled by reference to Appendix E of the jurisdictional statement in *Puryear* v. *Hogan*, No. 2199, Misc. Oct. Term, 1968.

Solicit or Collect Union Dues	N.Y. Unconsol. Laws, §§9933
See, in general	N.Y. Unconsol. Laws, §§9912, 9913

(B) Denial of the following licenses:

Civil Service Employment	N.Y. Civ. Service Law, §50(4)(d)	(guilty of crime or infamous or notoriously disgraceful conduct)
Junk Dealer	N.Y. Gen. Bus. Law, §60, §61	(larceny or knowingly receiving stolen property)
Private Investigator, Watch Guard or Patrol Agency	N.Y. Gen. Bus. Law, §74(2)	(conviction of specified crimes including making or possessing burglar's instruments and unlawful entry of building)
Employee of Private Investigator, Watch Guard, Patrol Agency	N.Y. Gen. Bus. Law, §81 (2)(d)	(same specified crimes as above)
Professional Bondsman	N.Y. Ins. Law, §331 N.Y. Code of Crim. Proc., 554-b	(conviction of any crime)

Carry, Possess, Repair and Dispose of Firearms	N.Y. Penal Law, §§400.00 (1)(a)(b)	(good moral character and not convicted of a crime specified in N.Y. Code of Crim. Proc., §552 including jostling)

(C) Suspension or revocation of the following licenses resulting from conviction of a "crime":

Practitioner of Medicine, Osteopath, Physiotherapist	N.Y. Educ. Law, §6514(2)(b)
Dentist	N.Y. Educ. Law, §6613(2)(a)(f)
Pharmacist	N.Y. Educ. Law, §6804(1)(b)
Professional Nurse	N.Y. Educ. Law, §6911(1)(a)
Optometrist	N.Y. Educ. Law, §7108(1)
Certified Public Accountant	N.Y. Educ. Law, §7406(1)(c)
Barber Shop	N.Y. Gen. Bus. Law, §441(a)(9)
Hairdressing, Cosmetology	N.Y. Gen. Bus. Law, §409(a)(9)
Attorneys	*In re Hughes*, 188 App. Div. 520, 177 N.Y.S. 234 (1st Dept. 1919)

(D) *Other Consequences*

Notary Public	N.Y. Exec. Law, §130	(conviction of certain specified misdemeanors)

Juror	N.Y. Judic. Law, §§504 (a)(b), 596(4), 662(4)	(conviction of misdemeanor of moral turpitude)
Public Housing	Standards for Admission of New York City Housing Authority; *Matter of Manigo* v. *New York City Housing Authority*, 51 Misc. 2d 829, 273 N.Y. Supp. 2d 1003 (Sup. Ct. 1966), aff'd, 27 App. Div. 2d 803, 279 N.Y. Supp. 2d 1014 (1st Dept. 1967), motion for leave to appeal denied, 19 N.Y. 2d 583, cert. denied, 389 U.S. 1008 (1967).	
Military Service	Army Reguation 601-270; See, Selective Service Law Reporter Practice Manual §1118, p. 1080.	

II. The following occupational and business licensing provisions require that an applicant be of "good moral character" before a license will issue:

Under New York Statutory Law

Teacher	N.Y. Educ. Law, §3018; 3012(2), 3013(3)
Osteopath	N.Y. Educ. Law, §6506(2)
Dentist	N.Y. Educ. Law, §6608(1)(a)
Dental Hygienist	N.Y. Educ. Law, §6614(2)(a)
Veterinarian	N.Y. Educ. Law, §6704(2)
Professional Nurse	N.Y. Educ. Law, §6906(1)(b)
Podiatrist	N.Y. Educ. Law, §7005(1)(b)
Optometrist	N.Y. Educ. Law, §7105(1)

Ophthalmic Dispensing	N.Y. Educ. Law, §7123(a)(1)
Professional Engineer	N.Y. Educ. Law, §7205(1)(c)
Land Surveyor	N.Y. Educ. Law, §7205(2)(c)
Architect	N.Y. Educ. Law, §7304(1)
Certified Public Accountant	N.Y. Educ. Law, §7403(1)
Certified Shorthand Reporter	N.Y. Educ. Law, §7502
Certified Psychologist	N.Y. Educ. Law, §7603(1)(b)
Certified Social Worker	N.Y. Educ. Law, §7705(1)(b)
Pawnbroker	N.Y. Gen. Bus. Law, §41
Ticket Agent	N.Y. Gen. Bus. Law, §150
Hairdressing and Cosmetology	N.Y. Gen. Bus. Law, §404(1)(b)
Hairdressing and Cosmetology Trainee	N.Y. Gen. Bus. Law, §405(1)
Barber	N.Y. Gen. Bus. Law, §434(1)(b)
Barber Shop	N.Y. Gen. Bus. Law, §438(3)
Attorney	N.Y. Judic. Law, §90 N.Y. Ct. of Appeals, Rule 8

Under New York City Administrative Code

Exhibitions and Performances	B32-1.0
Motion Picture Theatre License	B32-25.0
Non-Professional Motion Picture Exhibitions Code	B32-35.0
Billiard and Pool Tables	B32-45.0
Bowling Alleys	B32-46.0
Shooting Galleries	B32-47.0
Miniature Golf Courses	B32-48.0
Sidewalk Cafes	B32-54.0
Sidewalk Newsstands	B32-58.0
Sightseeing Guides	B32-77.0(e)
Street Musicians	B32-82.0
Public Cartmen	B32-93.0
Expressmen	B32-98.0
Public Porters	B32-106.0

Junk Dealers	B32-114.0	
Dealers in Second Hand Articles	B32-127.0	
Auctioneers	B32-138.0	
Laundries	B32-168.0	
Checking Facilities, Checkers	B32-177.0	
Locksmiths	B32-183.0	
Massage Operator	B32-194.0	
Bathing Establishments	B32-197.0	
Garages and Parking Lots	B32-251.0(b)	
Canvasser for Photographs or Photography	B32-264.0(c)	
Commercial Refuse Removal	B32-267.0(d)	
Conduct Bingo Games	B32-280.0(a)	(good moral character and never convicted of crime)
Public Dance Halls, Cabarets and Catering Establishments	B32-297.0(d)(1)	(fit and proper person)
Coffee Houses	B32-311.0(b)(1)	(fit and proper person)

Those regulations which do not specifically require the applicant to be of good moral character have been held to impose such requirement by implication. *Matter of Boston Trucking Corp.*, 7 N.Y. 2d 299, 165 N.E. 2d 163 (1959); *Matter of Larkin* v. *Schwab*, 242 N.Y. 330, 151 N.E. 637 (1926); *Matter of Picone*, 241 N.Y. 157, 149 N.E. 336 (1925).

IN THE

Supreme Court of the United States

October Term, 1969

No. 188

ROBERT BALDWIN,

Appellant,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

Appeal from the Court of Appeals of the State of New York

BRIEF FOR APPELLEE

FRANK S. HOGAN
District Attorney
New York County
Counsel for Appellee
155 Leonard Street
New York, New York 10013

MICHAEL R. JUVILER
LEWIS R. FRIEDMAN
DAVID OTIS FULLER, JR.
JOAN C. SUDOLNIK
Assistant District Attorneys
Of Counsel

TABLE OF CONTENTS

	PAGE
PRELIMINARY STATEMENT	1
JURISDICTION—REVIEW SHOULD BE BY CERTIORARI, NOT APPEAL	2
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	4
POINT I—The Sixth Amendment does not require a jury trial in New York State for offenses with a maximum penalty of imprisonment of one year	8
A. Whether a misdemeanor, punishable by up to one year's imprisonment, is a serious crime requiring a jury trial is to be determined by objective criteria of seriousness	8
B. In New York law misdemeanors are not treated as serious crimes	10
C. The distinction in New York law between serious and petty crimes coincides with the disinction at federal law between infamous and nonindictable crimes	12
D. The distinction in New York between serious and petty crimes coincides with the prevailing distinction between such crimes in the United States	15
E. Provisions for jury trial in other states support the New York cutoff of one year	19

PAGE

F. The historical background of the right to a jury trial supports New York's system 23

G. The severity of the punishment authorized for the offense charged is the only reliable test of its seriousness 28

POINT II—The limitation of six-man juries to misdemeanor trials conducted outside of New York City is not arbitrary, and therefore did not deprive appellant of the equal protection of the laws 31

POINT III—If this Court holds that a jury trial was constitutionally required in this case, the holding should not be retroactive to other cases already tried 44

CONCLUSION 49

APPENDICES:

A—One-Year Sentence Cutoff Between Petty and Serious Offenses in the United States A1

I. Misdemeanor/Felony Distinction, Maximum Imprisonment for Misdemeanor Is One Year A1

II. Misdemeanor/Felony Distinction, Maximum Imprisonment for Misdemeanor Is One Year to Be Served in State Prison or State Penitentiary A3

III. Right Not to Be Prosecuted Except by Grand Jury Indictment for Crimes Punishable by More Than One Year's Imprisonment A5

IV. Typical Collateral Consequences of Conviction of Crimes Punishable by More Than One Year's Imprisonment A6

PAGE

B—Collateral Consequences in New York of Convictions of an Offense A8

I. Convictions of any Felony A8

II. Conviction of any Misdemeanor A9

III. Conviction of Certain Misdemeanors or Violations A10

IV. Other A11

C—Survey of Provisions for Jury Trial A13

I. No Common Law, Sixth Amendment Jury Trial for Offenses Punishable by Imprisonment for a Maximum of One Year A13

(a) Fewer than twelve jurors A13

(b) Nonunanimous verdict A15

(c) No jury trial of any kind unless defendant is first found guilty without a jury A16

(d) Trial by the court alone, with no jurors at any stage A18

II. Common Law, Sixth Amendment Jury Trial for Offenses Punishable by Maximum Imprisonment of Six Months A19

III. Common Law, Sixth Amendment Jury Trial for Offenses Punishable by Maximum Imprisonment of 90 days A20

IV. Common Law, Sixth Amendment Jury Trial for Offenses Punishable by Maximum Imprisonment of 30 days A20

V. Common Law, Sixth Amendment Jury Trial for Offenses Punishable by Any Imprisonment A20

PAGE

D—Criminal Court of the City of New York—Case Load and Trials A23

I.—1968 Case Load A23

II.—1968 Trials A24

E—Dispositions of Non-Traffic Misdemeanor Cases by Courts of Inferior Jurisdiction in New York State A25

TABLE OF AUTHORITIES

PAGE

Cases:

Andres v. United States, 333 U.S. 740 (1948) 21

Baxstrom v. Herold, 383 U.S. 107 (1966) 43, 44
Bloom v. Illinois, 391 U.S. 194 (1968) 28, 45, 46
Bruton v. United States, 391 U.S. 123 (1968) 40

Callan v. Wilson, 127 U.S. 540 (1888) 20, 29
Chappell Chemical Co. v. Sulphur Mines Co., 172 U.S. 474 (1899) 34
Cheff v. Schnackenberg, 384 U.S. 373 (1966) 18

De Stefano v. Woods, 392 U.S. 631 (1968) 40, 44, 46
Desist v. United States, 394 U.S. 244 (1969) 48
District of Columbia v. Clawans, 300 U.S. 617 (1937) .. 9, 24, 25, 29, 31
District of Columbia v. Colts, 202 U.S. 634 (1930) 29
Duffy v. People, 6 Hill (N.Y.) 75 (1843) 13, 27
Duke v. United States, 301 U.S. 492 (1937) 13, 14
Duncan v. Louisiana, 391 U.S. 145 (1968) 4, 6, 7, 9, 10, 13, 18, 19, 20, 22, 26, 27, 30, 40, 41, 44, 45, 46, 47
Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968) 10, 28, 29

Escobedo v. Illinois, 378 U.S. 478 (1964) 48

Falconi v. United States, 280 Fed. 766 (6th Cir. 1922) 14
Frank v. United States, 395 U.S. 147 (1969) 9, 10, 29, 30, 31

Gardiner v. Michigan, 199 U.S. 325 (1905) 34
Garrity v. New Jersey, 385 U.S. 493 (1967) 2
Gideon v. Wainwright, 372 U.S. 335 (1963) 48
Gray v. Sanders, 372 U.S. 368 (1963) 16
Griffin v. California, 380 U.S. 609 (1965) 47
Green v. Board of Elections, 380 F.2d 445 (2d Cir. 1967), cert. denied 389 U.S. 1048 (1968) 16

PAGE

Hayes v. Missouri, 120 U.S. 69 (1887) 35

Jackson v. Commonwealth, 221 Ky. 823, 299 S.W. 983 (1927) 21
Jackson v. Denno, 378 U.S. 368 (1964) 40
Jackson v. Wood, 2 Cow. (N.Y.) 819 (1824) 26
Johnson v. New Jersey, 384 U.S. 719 (1966) 48

Knudson v. City of Anchorage, 358 P.2d 375 (Alaska 1960) 21

Mackin v. United States, 117 U.S. 348 (1886) 25
Mallett v. North Carolina, 181 U.S. 589 (1901) 35
Malloy v. Hogan, 378 U.S. 1 (1964) 47, 48
Maxwell v. Dow, 176 U.S. 581 (1900) 20, 21
McGowan v. Maryland, 366 U.S. 420 (1961) 33
Ex Parte Milligan, 71 U.S. 2 (1866) 12, 13
Miranda v. Arizona, 384 U.S. 436 (1966) 48
Missouri v. Lewis, 101 U.S. 22 (1879) 34
Morris v. Alabama, 302 U.S. 642 (1937) 34
Murphy v. People, 2 Cow. (N.Y.) 815 (1824) 26, 37

New York State Association of Trial Lawyers v. Rockefeller, 267 F. Supp. 148 (S.D.N.Y. 1967) 42
Norvell v. Illinois, 373 U.S. 420 (1963) 41

Ocampo v. United States, 234 U.S. 91 (1914) 34
Ohio v. Akron Park District, 281 U.S. 74 (1930) 34

Patton v. United States, 281 U.S. 276 (1930) 20, 21
People v. Bellinger, 269 N.Y. 265 (1935) 13, 14, 27
People v. Erickson, 302 N.Y. 461 (1951) 13
People v. Moses, 57 M.2d 960 (Crim. Ct. N.Y. Co. 1968) 38
People ex rel. Eckler v. Clark, 23 Hun 374 (1881) 20

PAGE

People ex rel. Comaford v. Dutcher, 83 N.Y. 240 (1880) 20, 27
People ex rel. Cosgriff v. Craig, 195 N.Y. 190 (1909) 27
People ex rel. Frank v. McCann, 253 N.Y. 221 (1930) 20
People ex rel. Murray v. Justices, 74 N.Y. 406 (1878) 20
Puryear v. Hogan, —— U.S. ——, No. 336 Misc. (Oct. 13, 1969) 2

Rasmussen v. United States, 197 U.S. 516 (1905) 20

Salsburg v. Maryland, 346 U.S. 545 (1954) 33, 37, 42
Schick v. United States, 195 U.S. 65 (1904) 9, 13, 15
Shapiro v. Thompson, 394 U.S. 618 (1969) 32
South Carolina v. Katzenbach, 383 U.S. 301 (1966) 42
State v. Hoben, 256 Minn. 436, 98 N.W. 2d 813 (1959) 38
State v. Jackson, 69 N.H. 511, 43 Atl. 749 (1898) 21, 25
State v. Maier, 13 N.J. 235, 99 A.2d 21 (1953) 21, 26
State v. Owens, 102 N.J. Super. 187, 245 A.2d 736 (1968), aff'd 54 N.J. 153, 254 A.2d 97 (1969) 13, 26, 29, 30
Stovall v. Denno, 388 U.S. 293 (1967) 48

Tehan v. Shott, 382 U.S. 406 (1966) 47
Territory v. Kiyoto Taketa, 27 Haw. 844 (1924) 23
Thompson v. Utah, 170 U.S. 343 (1898) 20, 21, 23

United States v. Moreland, 258 U.S. 433 (1922) 14, 16, 24
United States v. Sloan, 31 F. Supp. 327 (W.D.S.C. 1940) 14
United States v. Wade, 388 U.S. 218 (1967) 48

Walber v. Piggins, 2 Mich. App. 145, 138 N.W. 2d 772 (1966) 35
Ex Parte Wilson, 114 U.S. 417 (1885) 14, 16, 24, 30
Whittaker v. Superior Court, 68 Cal.2d 357, 438 P.2d 358 (1968) 36, 42

PAGE

Statutes and Constitutions:

Cal. Constitution, Article I, §7 23
Cal. Penal Code Ann. §190 23
Cal. Penal Code Ann. §689 23
Cal. Penal Code Ann. §1042 23
Fed. R. Crim. Proc. 7(a) 14
Fed. R. Crim. Proc. 23 19
Fed. R. Crim. Proc. 43 19
Fed. R. Proc. for U.S. Magistrates 5(c) 19
Ga. Laws 1890-1891, pp. 935, 939 35
Haw. Rev. Laws §216-7 22
Kan. Gen. Stat. Ann. §20-1204 46
Kan. Gen. Stat. Ann. §21-111 46
Ky. Rev. Stat., Chapters 25, 26 35
La. Rev. Stat. Ann. §13:2561.11 36
La. Rev. Stat. Ann. §13:2562.11 36
Mass. Declaration of Rights §12 13
Minn. Stat. Ann. §484.63 36
Minn. Stat. Ann. §488A.01(11) 36
N. J. Stat. Ann. §2A:3-6 36
N. J. Stat. Ann. §2A:7-1 36
N. J. Stat. Ann. §2A:7-20 36
N. Y. C. Crim. Ct. Act §31 11
N. Y. C. Crim. Ct. Act §32 8
N. Y. C. Crim. Ct. Act §40 ..... 2, 3, 8
N. Y. Code Crim. Proc. §22 11
N. Y. Code Crim. Proc. §177 11
N. Y. Code Crim. Proc. §355 11
N. Y. Code Crim. Proc §517(2) 35
N. Y. Code Crim. Proc. §517(3) 36
N. Y. Code Crim. Proc. §701 31
N. Y. Code Crim. Proc. §710 31
22 NYCRR §640.1 35
22 NYCRR §730.1(c) 35
22 NYCRR §730.1(e) 35
22 NYCRR §2950.10(a) 37

PAGE

N. Y. Corr. Law §304 9
N. Y. Constitution, Article I, §2 11
N. Y. Constitution, Article I, §6 ..... 11, 14
N. Y. Constitution, Article VI, §18 11
N. Y. Elec. Law §152 12
N. Y. Penal Law §10.00(3) 11
N. Y. Penal Law §10.00(4) 11
N. Y. Penal Law §10.00(5) 11
N. Y. Penal Law §10.00(6) 11
N. Y. Penal Law §65.00 9
N. Y. Penal Law §65.05 9
N. Y. Penal Law §70.00 11
N. Y. Penal Law §70.00(2)(e) 28
N. Y. Penal Law §70.05(2) 11
N. Y. Penal Law §70.15 ..... 8, 11
N. Y. Penal Law §70.20(1) 11
N. Y. Penal Law §70.20(2) 11
N. Y. Penal Law §70.30(3) 9
N. Y. Penal Law §70.30(4)(b) 9
N. Y. Penal Law §155.30 28
N. Y. Penal Law §165.25 ..... 1, 3
N. D. Cent. Code Ann. §5-01-22 46
N. D. Cent. Code Ann. §42-02-10 46
S. C. Code §15-601 36
S. C. Code §15-612 36
S. C. Code §15-629 et seq. 36
S. D. Code §13.0607 46
S. D. Code §13.1235 46
S. D. Code §32.0905 36
S. D. Code §32.0906 36
S. D. Code §32.0911 36
S. D. Code §33.3703 46
U. S. Constitution, 5th Amendment 5, 12, 13, 14, 31, 47
U. S. Constitution, 6th Amendment ..... *passim*
U. S. Constitution, 14th Amendment 2, 3, 4, 6, 16, 44, 45, 48
18 U.S.C. §1 ..... 17, 18

PAGE

18 U.S.C. §2516(2) 18
18 U.S.C. §3052 17
18 U.S.C. §3056 17
18 U.S.C. §3401 ..... 2, 17, 19
18 U.S.C. §3401, repealed 1968 17
28 U.S.C. §1257(2) 2
28 U.S.C. §1865(b)(5) 18
U. S. Crim. Code §335, C. 321, 35 Stat. 1088, 1152 eff. 1910 13
Va. Code §16.1-106 36

Other Authorities:

American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Trial by Jury (tent. 1968) 41
4, Blackstone Commentaries (Cooley Ed. 1899) 15, 24
Boardman's New York Family Law (1967) 17
Comment, *Should Jury Verdicts Be Unanimous in Criminal Cases*, 47 Ore. L. Rev. 417 (1968) 21
Congressional Record, Vol. 72, Part IX, June 3, 1930 18
Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury*, 39 Harv. L. Rev. 917 (1926) 21, 24, 25, 26
Kalven & Zeisel, The American Jury (1966) 41
House Report No. 1699, 46 Stat. 1029, Dec. 16, 1930 18
McDaniel, The Virginia Constitutional Convention of 1901-1902 (1928) 21
N.Y.C. Crim. Justice Coordinating Council, 18-Month Report, N.Y.L. Jour., Feb. 5, 1969, p. 4, col. 4 36
N. Y. Post, Oct. 13, 1969, p. 37 38
N. Y. Times, Jan. 3, 1954, p. 34, col. 1 37
Note, *Right to Jury Trial of Persons Accused of an Ordinance Violation*, 47 Minn. L. Rev. 93 (1962) 38
President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (1967) 38

PAGE

RAND MCNALLY POPULATION ESTIMATES, COMMERCIAL ATLAS AND MARKETING GUIDE (100th ed. 1969) 38, 39

Records, Office of the State Administrator of the Judicial Conference of the State of New York 39

Senate Report (Judiciary Committee) No. 371, 90th Congress, 1st Session, June 28, 1967 17

Speech, Judicial Conference of the Second Judicial Circuit of the United States, Lake Placid, N.Y., Sept. 14, 1968, reprinted in N.Y.L. Jour., Sept. 25, 1968, p. 1 40

U. S. CENSUS, STATISTICAL ABSTRACT 1968 38

U. S. Treas. Dept., Bureau of Narcotics, Traffic in Opium and Other Dangerous Drug for Period Ended Dec. 31, 1967 39

IN THE

Supreme Court of the United States

October Term, 1969

No. 188

ROBERT BALDWIN,

Appellant,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

Appeal from the Court of Appeals of the State of New York

BRIEF FOR APPELLEE

Preliminary Statement

This is an appeal from a judgment of the New York Court of Appeals, entered March 6, 1969 (App. 23),* which affirmed an order of the Appellate Term of the New York Supreme Court, First Department, entered January 10, 1969, affirming a judgment of conviction rendered on September 3, 1968 in the Criminal Court of the City of New York. Appellant was convicted after trial of the crime of jostling [N.Y. Penal Law §165.25] and was sentenced to a term of imprisonment of one year.

* References "App." are to the separate appendix filed pursuant to Rule 36.

Jurisdiction—Review Should Be by Certiorari, Not Appeal

On April 8, 1969, appellant's appeal from the judgment of the New York Court of Appeals was docketed in this Court, appellant challenging the constitutionality of Section 40 of the New York City Criminal Court Act, which provides that all trials in the court shall be without a jury. Appellee filed a motion to affirm, but on June 2, 1969, probable jurisdiction was noted.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1257(2). However, this case does not, as is required by that section, necessarily call for review of the constitutionality of the New York statute. Whether or not Robert Baldwin's conviction may be sustained under the Sixth and Fourteenth Amendments, there would be no constitutional requirement that trials in the New York City Criminal Court be held with a jury. The state could still constitutionally provide that if the defendant wished a jury trial, his case should be transferred to another court, as has been provided by Congress for federal misdemeanors in the Federal Magistrates Act of 1968. 18 U.S.C. §3401. There is no legislation authorizing a jury trial in the New York City Criminal Court, no procedural machinery for such a trial, and no constitutional requirement that such trials be held in that specific court, whatever the scope of the Sixth and Fourteenth Amendments. Accordingly, this Court should dismiss appellant's appeal, but treating the papers as a petition for certiorari, should grant certiorari. *Garrity v. New Jersey*, 385 U.S. 493, 495-496 (1967); compare *Puryear* v. *Hogan*, no. 336 Misc., *appeal dismissed* (Oct. 13, 1969).

Questions Presented

1. Do the Sixth and Fourteenth Amendments require a jury trial in New York State for offenses with a maximum penalty of one year's imprisonment?

2. Does the limitation of six-man juries to misdemeanor trials conducted outside of New York City deprive an accused misdemeanant in New York City of the equal protection of the laws?

Statement of the Case

In the evening of August 10, 1968, Patrolman Joseph Crowley of the Port of New York Authority Police was on duty in the Port of New York Authority Bus Terminal in Manhattan. At about 9 p.m., from a balcony overlooking a busy escalator, he noticed appellant Robert Baldwin and one Arthur Bethea on the descending escalator. Bethea moved right beside a woman and made "a body contact" with her, while appellant moved behind her, to her left (App. 13). As Bethea turned toward the left, appellant opened her pocketbook, which she carried by a strap (App. 11, 13), and removed some loose money (App. 8-9). Crowley and a fellow officer left the balcony and arrested appellant and Bethea, finding a ten-dollar bill in appellant's possession (App. 9, 10).

A complaint alleging the misdemeanor of jostling [N.Y. Penal Law §165.25] was filed in the New York City Criminal Court (App. 1). The request of the two defendants for a jury trial was denied (App. 7), but the defendants did not invoke their statutory right to a three-judge bench. See N.Y.C. Crim. Ct. Act §40. After a trial before a judge of the Criminal Court on August 26, 1968, appellant

and Bethea were convicted as charged, and on September 3, 1968, they were sentenced to serve one year in the New York City correctional institution, the court taking note of appellant's long criminal record, including convictions for auto theft, assault, burglary and larceny (App. 20). Only appellant Baldwin appealed from the judgment. After affirmance by the Appellate Term, First Department, of the New York Supreme Court (App. 22), leave to appeal to the New York Court of Appeals was granted by Chief Judge Fuld. In that court appellant contended only that he was constitutionally entitled to a jury trial under the Sixth Amendment and the equal protection clause of the Fourteenth Amendment. The conviction was affirmed in an opinion by Associate Judge Scileppi (App. 25), two judges dissenting (App. 36).

Summary of Argument

Appellant, who was convicted without a jury trial of the misdemeanor of jostling, and sentenced to one year's imprisonment, the maximum penalty for a misdemeanor in New York, claims that he was entitled to a jury trial under the Sixth and Fourteenth Amendments because his offense was a "serious" crime. In *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), this Court held that a defendant who is tried in a state court for a "serious" offense has the right to a trial by jury, but the Court left open the question whether a crime punishable by a maximum term of imprisonment of one year is a serious offense under the Sixth Amendment. Appellant Baldwin discerns a maximum cutoff of six months' imprisonment dividing serious and petty offenses. However, the determination as to cutoff, as this Court has stated, must be based upon objective indications of the seriousness with which the community judges the

offense, and the objective evidence as to seriousness of crimes in contemporary American criminal law shows clearly that the suitable cutoff separating serious and petty offenses is a maximum term of imprisonment of one year, not six months.

It is well settled, for example, that "infamous" crimes, prosecutable by indictment by virtue of the Fifth Amendment, are crimes punishable by more than one year's imprisonment, or imprisonment at hard labor, or in a state or federal penitentiary. These penalties are reserved in New York State for felonies, misdemeanors being sharply distinguished from felonies as minor offenses. Further, all states and the federal system of criminal justice classify crimes as felonies and misdemeanors, and in the majority of states, and the federal system, misdemeanors are crimes whose maximum penalty of imprisonment is one year, a six-month boundary appearing in only a few states. Similarly, the one-year punishment is served in a local jail in twenty-~~three~~ two states, including New York, only felons being liable to a state penitentiary sentence. In addition, New York and the majority of the other states reserve serious collateral consequences, such as disenfranchisement, for felonies punishable by a maximum penalty greater than one year. Plainly, the treatment of crimes in contemporary American jurisprudence establishes a clear boundary between serious and petty offenses, turning on the one-year maximum penalty of imprisonment for the lesser crimes.

The validity of the New York system, with its one-year cutoff, is confirmed by provisions for jury trial in the various states. The jury trial contemplated by the federal constitution is a jury of twelve persons rendering a unani-

mous verdict at a trial in the first instance, not a trial *de novo*. In 13 states from coast to coast, no such jury is provided for crimes carrying a maximum penalty of imprisonment of one year; nevertheless, reviewing provisions for jury trials in the states, this Court noted in *Duncan* that the application of Sixth Amendment principles to trials in state courts would have no widespread effect on state procedures, and supported this conclusion with evidence that in very few states is a common law jury withheld for crimes punishable by more than one year's imprisonment. The limitation of common law juries to trials of offenses punishable by more than one year is substantial evidence that misdemeanors with a one-year maximum sentence are not considered serious crimes warranting a constitutionally required jury trial. By contrast, only six states provide a Sixth Amendment jury trial for crimes with a maximum penalty of six months' imprisonment, the cutoff which appellant proposes. Moreover, the highest courts of New York and New Jersey, states whose constitutions contain provisions for trial by jury similar to the Sixth Amendment, based upon similar Colonial and common law background, have determined that a one-year maximum penalty does not render an offense serious.

Appellant also claims denial of the equal protection of the laws under the Fourteenth Amendment, because a six-man "jury" is available for misdemeanor trials held outside of New York City only. No invidious discrimination is shown, however, by this reasonable territorial division. This Court has frequently upheld similar geographical distinctions drawn by state legislatures, in cases involving jury trial procedures, admissibility of evidence, criminal appeals, and preliminary hearings. Contemporary juris-

prudence reflects many instances in which cities or populous counties are singled out for separate treatment in the provisions for jury trials, or other criminal procedures.

Far from an irrational, hostile classification, withholding six-man jury trials from the New York City Criminal Court is rationally designed to reduce the enormous expense, delays, and congestion associated with the administration of justice in that court. New York City's unique crime-engendering problems are reflected in its criminal court case load, a burden 39 times as great as that in the next largest city in the state, far out of proportion to the difference in population. Such considerations are material in determining the reasonableness of state laws which limit jury trials to serious offenses. *Duncan* v. *Louisiana, supra* at 160.

Without suggesting that appellant's constitutional claims are correct, we note that a question of retroactivity would be raised if appellant's arguments were accepted. *Duncan* v. *Louisiana* is not retroactive, and the same result would presumably obtain here, a holding in appellant's favor in this case being applied only to him, and to defendants whose trials had not yet begun on the date of the decision in the present case. Retroactivity would not be required by the purpose of a Sixth Amendment or equal protection ruling in appellant's favor, there being no impairment of the integrity of the fact-finding process without a jury trial. But retroactivity would cause substantial disruption of the administration of justice in a court already overloaded. Moreover, it would ignore the justified reliance of state officers on the validity of the New York system, a reliance which was encouraged by the opinion in *Duncan*.

POINT I

The Sixth Amendment does not require a jury trial in New York State for offenses with a maximum penalty of imprisonment of one year.

A. Whether a misdemeanor, punishable by up to one year's imprisonment, is a serious crime requiring a jury trial is to be determined by objective criteria of seriousness.

Under a statutory scheme dating back to the common law and the Colonies and accepted for two centuries, trials in the New York City Criminal Court, which has jurisdiction to try all misdemeanors committed in New York City, take place without a jury. N.Y.C. Crim. Ct. Act §40. Trials of misdemeanors in the Criminal Court are normally conducted before one judge, but in most cases either party may demand a three-judge bench. *Ibid.* In addition, the defendant may ask a justice of the Supreme Court, the superior criminal court, to order that the case be prosecuted by indictment and tried by a twelve-man jury in the Supreme Court, a matter resting in the court's discretion. N.Y.C. Crim. Ct. Act §32.

There are two classes of misdemeanors in New York, punishable differently. A Class A misdemeanor, of which appellant was convicted, carries a maximum sentence of imprisonment of one year, while the maximum imprisonment for a Class B misdemeanor is three months. N.Y. Penal Law §70.15. The court may, in the alternative, place the convicted Class A misdemeanant on probation for up to three years, the Class B misdemeanant for one year,

or may order a sentence of unconditional discharge, comparable to a suspended sentence. N.Y. Penal Law §§65.00, 65.05. A defendant sentenced to imprisonment for one year is entitled to credit for good behavior in jail, so that in most cases the actual term of imprisonment is reduced to ten months. N.Y. Penal Law §70.30(4)(b); N.Y. Correction Law §304. Appellant Baldwin, for example, was released after ten months' imprisonment, dating from his original confinement upon arrest. *Cf.* N.Y. Penal Law §70.30(3).

In *Duncan* v. *Louisiana,* 391 U.S. 145 (1968), this Court held

> "that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee." *Id.* at 149.

The Sixth Amendment right to a jury trial, the court reminded, applies only to "serious crimes" and not to "petty offenses." See also *Schick* v. *United States,* 195 U.S. 65, 70 (1904); *District of Columbia* v. *Clawans,* 300 U.S. 617, 628 (1937). While declining to "settle the exact location of the line between petty offenses and serious crimes," *Duncan* v. *Louisiana, supra* at 161, the Court has offered guidelines. In its most recent pronouncement on the subject, the Court stated, in an opinion by Mr. Justice MARSHALL:

> "In determining whether a particular offense can be classified as 'petty,' this Court has sought objective indications of the seriousness with which society regards the offense. • • • The most relevant indication of the seriousness of an offense is the severity of the penalty authorized for its commission." *Frank* v. *United States,* 395 U.S. 147, 148 (1969).

The Court has held that "a six-month sentence is short enough to be petty." *Dyke* v. *Taylor Implement Mfg. Co.*, 391 U.S. 216, 220 (1968); *Duncan* v. *Louisiana, supra* at 159; *Frank* v. *United States, supra* at 150. Moreover, a sentence of probation for three years—available in New York State for a Class A misdemeanor—does not entitle the defendant to a jury trial under the Constitution. *Frank* v. *United States, supra.*

Appellant Baldwin contends that six months' imprisonment is the most that may be prescribed without a jury trial (appellant's brief, pp. 8-9, 14-16). However, a six-month cutoff would be unsupported by substantial objective evidence of seriousness. In referring to such "objective criteria" in the *Duncan* case, this Court made reference to federal and state laws defining petty offenses, but undertook no detailed examination, since it was sufficient in *Duncan* to hold that based on present standards in this country a crime punishable by two years' imprisonment was a serious crime. A more comprehensive examination of state and federal laws, undertaken by appellee, shows that in contemporary American criminal law, a maximum sentence of one year stands out clearly as the mark dividing petty offenses and serious crimes, and that the New York system is precisely in line with the prevailing national position.

B. In New York law misdemeanors are not treated as serious crimes.

In 1967 the New York legislature revised the Penal Law to rationalize the classification and punishment of crimes. Numerous felonies were reduced to misdemeanors, and many offenses formerly misdemeanors were reduced to

"violations," which are not crimes, and are punishable by no more than fifteen days' imprisonment. N.Y. Penal Law §§10.00(3), 10.00(6), 70.15. The resulting classification shows deliberate action by the legislature to separate serious crimes into the category of felonies—crimes punishable by "imprisonment in excess of one year" [N.Y. Penal Law §10.00(5)]—and to leave the less serious crimes to be treated differently.

For felonies the prison sentences allowable are generally indeterminate sentences, with a maximum term of at least three years, and the defendant is committed to the custody of the State Department of Correction for incarceration in a State Prison. N.Y. Penal Law §§70.00, 70.20(1), 70.05(2). For a misdemeanor the maximum sentence is to a definite term of up to one year in a county or regional jail. N.Y. Penal Law, §§10.00(4), 70.15, 70.20(2). There is no provision for imprisonment at hard labor. While misdemeanors are normally prosecuted by information or complaint, no person may be prosecuted for a felony without indictment by a grand jury, and accused felons are entitled to be tried by a regularly constituted twelve-man petit jury. N.Y. Const. Art. I, §§2, 6, and Art. VI, §18; N.Y. Code Crim. Proc. §§22, 355; N.Y.C. Crim. Ct. Act §31. Police powers of arrest are broader for felonies than lesser offenses. N.Y. Code Crim. Proc. §177.

The sharp differences in the manner of prosecution and in the direct consequences of conviction of felonies and misdemeanors are followed by differences in the collateral effects.* Conviction of any felony results in the automatic

* Appendix B *infra* sets forth citations to provisions which govern the collateral consequences of conviction in New York State.

denial or revocation of certain important rights and privileges in New York State, such as forfeiture of public office and civil rights, and disbarment. Similarly, only a felon loses the right to vote, one of the most fundamental rights of citizenship. N.Y. Election Law §152. On the other hand, in only a very narrow class of cases is a privilege or license automatically denied or revoked following conviction of any misdemeanor. As a general rule, conviction of a misdemeanor merely gives a licensing or supervisory authority the discretionary power to revoke or suspend a license or to remove an individual from an occupation or business affecting the public welfare.

The distinctions presently drawn in New York between felonies and misdemeanors are important not only because they reflect clearly the New York community's judgment that crimes in the state are to be divided into two distinct categories, one serious, the other not. They are important also because they accord with federal law and the positions of other states relating to the classification of crimes.

C. The distinction in New York law between serious and petty crimes coincides with the distinction at federal law between infamous and nonindictable crimes.

The difference between serious and petty crimes in New York coincides with the settled difference between "infamous," indictable federal crimes, and other crimes. Certainly, the Fifth Amendment right not to be "held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury," is objective evidence of the scope of "serious crimes" under the Sixth Amendment. As was stated in another context in the historic opinion in *Ex parte Milligan*, 71 U. S. 2

(1866), "* * * * the framers of the Constitution, doubtless, meant to limit the right to trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth." *Id.* at 123. The parallel between the right to indictment and the right to jury trial was noted again in *Duncan*, Mr. Justice WHITE quoting Blackstone's 18th Century discussion:

> " 'Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown.' " 391 U. S. at 151.

In *Schick* v. *United States*, 195 U. S. 65 (1904), the Court used the term "serious offense," as applied to the Sixth Amendment, interchangeably with the term "infamous crime" in the Fifth Amendment, thereby reflecting common understanding. 195 U. S. at 68; see also *State* v. *Owens*, 54 N.J. 153, 159-161, 254 A.2d 97, 100-101 (1969); *Duffy* v. *People*, 6 Hill (N.Y.) 75, 78 (1843); *People* v. *Bellinger*, 269 N.Y. 265 (1935); *People* v. *Erickson*, 302 N.Y. 461, 466 (1951); Mass. Decl. of Rights §12. After the *Schick* decision, *supra*, Congress provided:

> "All offenses which may be punished by death, or imprisonment for a term exceeding *one year*, shall be deemed felonies. All other offenses shall be deemed misdemeanors" (emphasis added). Crim. Code §335, c. 321, 35 Stat. 1088, 1152, enacted 1908, eff. 1910, quoted in *Duke* v. *United States*, 301 U. S. 492 (1937).

The effect of this statute was to divide serious, or infamous crimes, which were to be prosecuted by indictment, from petty offenses, which could be prosecuted by information. This distinction between indictable and other offenses,

based upon the one-year sentence, has been approved by the federal courts. *Duke* v. *United States, supra; Falconi* v. *United States*, 280 Fed. 766, 767 (6th Cir. 1922); *United States* v. *Sloan*, 31 F. Supp. 327, 331 (W.D.S.C. 1940); see also N.Y. Const. Art. I, §6; *People* v. *Bellinger*, 269 N.Y. 265, 271 (1935). It has been preserved by the Federal Rules of Criminal Procedure.* While the Fifth Amendment right to indictment has not been applied to the states, laws in some states provide that a person has the right not to be prosecuted for certain crimes except by indictment by a grand jury, and it is significant that in almost all of these states the indictable crimes carry more than a one-year sentence, and the non-indictable crimes are punishable by imprisonment for a maximum of one year (see Appendix A III, *infra*, pp. A5-A6).

Indictable offenses under the Fifth Amendment also include offenses punishable by imprisonment in a penitentiary or at hard labor [Fed. R. Crim. Proc. 7(a); *Ex parte Wilson*, 114 U. S. 417, 426 (1885); *United States* v. *Moreland*, 258 U. S. 433 (1922)], or by disqualification from holding public office. *Ex parte Wilson, supra* at 426. Again, these consequences apply to felonies in New York, but not to misdemeanors.

In short, New York's classification of crimes is precisely in line with the Fifth Amendment distinction between in-

* "An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or information. An information may be filed without leave of court." Fed. R. Crim. Proc. 7(a); see also Notes of Advisory Committee on Rules.

dictable and non-indictable offenses. The requirement of a grand jury indictment expresses the same policies as the right to a jury trial: protection, through the intervention of the citizenry, against arbitrary action by the Government. Since an offense punishable by up to one year in jail, without hard labor, may be tried without the constitutional protection afforded by a grand jury, it may be tried without a petit jury.

D. The distinction in New York between serious and petty crimes coincides with the prevailing distinction between such crimes in the United States.

New York's division between serious and petty offenses accords not only with the "infamous crime" classification at federal law, but with the predominant classification of serious and petty offenses throughout the United States. In every state, as in the federal system of criminal justice, serious crimes are classified as "felonies," lesser offenses as "misdemeanors." This universal classification is highly relevant to an assessment of the seriousness of a New York misdemeanor. It reflects commonly accepted notions as to the boundary between two clearly distinguishable classes of crimes, serious crimes and misdemeanors. Indeed, in *Schick* v. *United States, supra,* 195 U.S. 65, 68-72 (1904), the treatment of the historical background of the right to trial by jury confirmed that misdemeanors are petty offenses within the meaning of the Sixth Amendment. As was noted in *Schick,* 165 U.S. at 69-70, quoting 4 BLACKSTONE COMMENTARIES 5:

> "'In common usage the word "crimes" is made to denote such offenses as are of a deeper and more atrocious dye; while merely faults and omissions of

> less consequence are comprised under the general name of "misdemeanors" only.' "

As appellant points out, in some jurisdictions, such as Louisiana, serious offenses, punishable by more than one year, may be called "misdemeanors." But in the majority of states, and the federal system, misdemeanors are punishable by not more than one year's imprisonment, felonies by a greater amount (see Appendix AI, *infra*, pp. A1-A3). A six-month boundary between misdemeanors and felonies is far from the general pattern.

Another objective indication of the seriousness of crime is the type of prison where the sentence is to be served. *Ex parte Wilson*, 114 U.S. 417 (1885); *United States* v. *Moreland*, 258 U. S. 433 (1922). Again, the one-year cutoff prevails. In twenty-two states, the largest group, misdemeanor sentences of up to one year are served in the county jail, felony sentences in a state prison or penitentiary, as in New York (see Appendix AII, *infra*, pp. A3-A5).

Similarly, many states, like New York, impose serious collateral disabilities upon convicted felons which are not visited upon misdemeanants. For example, twenty-six of the states with a one-year cutoff between misdemeanors and felonies (listed in Appendix AI, *infra*) provide for depriving convicted felons of the right to vote. See *Green* v. *Board of Elections*, 380 F.2d 445, 450-451 (2d Cir. 1967), *cert. denied* 389 U. S. 1048 (1968). The exclusion of "felons" from voting has been cited as a reasonable classification, permitted by the Fourteenth Amendment. *Gray* v. *Sanders*, 372 U. S. 368, 380 (1963); *Green* v. *Board of Elections, supra*. In many states with the one-year cutoff between felonies and misdemeanors, and in the federal sys-

tem, convicted felons are deprived of the right to hold public office (see Appendix A IV, *infra*, pp. A6-A7). Conviction of a felony is a ground for divorce in most states. BOARDMAN'S N.Y. FAMILY LAW, Chart of Divorce Laws (1967).

Congress, in addition to its historic choice of the one-year sentence as the boundary for indictable offenses, has frequently indicated that the one-year sentence reflects the contemporary American view of seriousness. The national legislature has preserved the standard distinction between felonies and misdemeanors, the latter punishable by no more than one year's imprisonment. 18 U.S.C. §1. Powers of federal officers to arrest are broader for felonies than misdemeanors, as in New York. 18 U.S.C. §§3052, 3056.

In the Federal Magistrates Act of 1968, Congress adopted the term "minor offenses," defining these as "misdemeanors punishable under the laws of the United States, the penalty for which does not exceed imprisonment for a period of one year, or a fine of not more than $1000, or both." 18 U.S.C. §3401(f). Jurisdiction over most "minor offenses" was vested in the United States Magistrate, subject to the defendant's approval, the Magistrate replacing the United States Commissioner, whose jurisdiction had been limited to "petty offenses" punishable by no more than six months' imprisonment. 18 U.S.C. §3401, *repealed* 1968. It was the view of Congress that "such minor criminal matters," punishable by more than six months but not more than one year, could easily be handled by a lesser judicial officer than a United States District Judge, whose court should not be burdened with them. Senate Report (Judiciary Committee) No. 371, 90th Congress, 1st Session, June 28, 1967, p. 30.

Further, the Omnibus Crime Control and Safe Streets Act of 1968 authorized eavesdropping by state court order in the investigation of crimes not enumerated in the statute only if the penalty is more than one year's imprisonment. 18 U.S.C. §2516(2). And in liberalizing recently the provisions for selection of grand and petit jurors, Congress chose to disqualify persons who have been convicted of a crime punishable by more than one year's imprisonment. Jury Selection and Service Act of 1968, 28 U.S.C. §1865(b)(5). These congressional enactments, many effective since the *Duncan* decision, reflect the Congressional view that a one-year sentence is the appropriate point at which to divide serious and petty offenses.

Appellant relies upon 18 U.S.C. §1, wherein Congress in 1930 distinguished "petty offenses" from other crimes. That provision has been referred to by this Court in ruling, in the exercise of its supervisory power over the lower federal courts, that penalties not exceeding six months could be imposed in criminal contempt cases without affording the right to a jury trial. *Cheff* v. *Schnackenberg,* 384 U. S. 373, 379-380 (1966). But that provision carries no weight in a constitutional analysis under the Sixth Amendment. Far from reflecting a serious view of a constitutional demarcation, it appears to have been a compromise cutoff, designed to remove minor prohibition cases from the cumbersome procedure of prosecution by indictment and trial by jury. House Report No. 1699, 46 Stat. 1029, Dec. 16, 1930; Congressional Record, Vol. 72, Part IX, pp. 9991-9994, June 3, 1930. Today, the legislative classification of "petty offenses" in Section 1 stands in isolation in the United States Code, its significance removed by the Federal Magistrates Act. Indeed, there is

no cutoff for jury trials for federal crimes, provisions of Congress and this Court for jury trial in United States District Courts remaining noncommittal.* By contrast, Rule 43 of the Federal Rules of Criminal Procedure provides that the defendant must be present at a trial of an offense punishable by imprisonment for more than *one year*, but may waive presence at a trial of an offense punishable by not more than *one year*.

E. Provisions for jury trial in other states support the New York cutoff of one year.

Ignoring the substantial indications throughout the nation that misdemeanors punishable by no more than one year's imprisonment are not in the class of serious crimes, appellant turns to provisions relating to the manner of trial, and asserts that "New York City is the only place in the United States where appellant could have been sentenced to a year's imprisonment without a jury trial" (appellant's brief, p. 12). However, the question in this case is a constitutional question under the Sixth Amendment, and this Court made it clear in *Duncan* that New

---

* "Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval and consent of the Government." Fed. R. Crim. Proc. 23.

The Federal Magistrates Act of 1968 provides:

> "Any person charged with a minor offense may elect, however, to be tried before a judge of the district court for the district in which the offense was committed. The magistrate shall carefully explain to the defendant that he has a right to trial before a judge of the district court and that he *may* have a right to trial by jury before such judge and shall not proceed to try the case unless the defendant, after such explanation, signs a written consent to be tried before the magistrate that specifically waives both a trial before a judge of the district court and any right to trial by jury that he *may* have" (emphasis added). 18 U.S.C. §3401(b). See also Fed. R. Proc. for U. S. Magistrates 5(c).

York is not alone in withholding a Sixth Amendment jury trial for offenses carrying a penalty of up to one year in jail. The Court pointed out that many states provide no jury trial of the type recognized by the United States Constitution, for crimes punishable by up to one year's imprisonment. 391 U. S. at 158, n.30.

Nine states, including New York, authorize juries of fewer than twelve persons for crimes punishable by a maximum sentence of imprisonment of one year in jail.* This Court has ruled that the constitutional right to a jury trial, where applicable, requires a twelve-man jury; the New York Court of Appeals has frequently so held, approving the six-man juries that are used outside New York City only on the ground that the right to trial by jury does not apply to misdemeanors.**

Similarly, in five states a jury trial is available only on appeal for persons who have been previously found guilty, after a trial without a jury, of offenses carrying a maximum penalty of one year's imprisonment. This practice has been held to be unconstitutional as to cases governed by the federal constitution. *Callan* v. *Wilson,* 127 U. S. 540, 557 (1888). In one state nonunanimous verdicts are permitted in cases where a maximum term of imprisonment

---

* See Appendix C, *infra,* for a survey of state provisions for jury trial. This Appendix differs in organization and content from appellant's Appendix A.

** *Patton* v. *United States,* 281 U.S. 276, 288, 290 (1930); *Maxwell* v. *Dow,* 176 U.S. 581, 586 (1900); *Thompson* v. *Utah,* 170 U.S. 343, 349, 350, 353 (1898); *Rasmussen* v. *United States,* 197 U.S. 516 (1905); *People ex rel. Frank* v. *McCann,* 253 N.Y. 221, 225-226 (1930); *People ex rel. Eckler* v. *Clark,* 23 Hun 374, 376 (1881); *People ex rel. Murray* v. *Justices,* 74 N.Y. 406 (1878); *People ex rel. Comaford* v. *Dutcher,* 83 N.Y. 240 (1880).

of one year is prescribed. Again, under pronouncements of this Court such a "jury trial" would be no trial at all if a constitutional right to trial by jury were applicable.*

Thus, there are thirteen different states** whose provisions for trial of misdemeanors carrying maximum penalties of one year in jail would be void if such a sentence rendered the crime "serious" within the meaning of the Sixth Amendment. It is noteworthy that the constitutions of many of these states contain provisions for trial by jury comparable or identical to the Sixth Amendment, and that five of these states were among the original Colonies, whose systems of justice incorporated the common law concept of jury trial.† This experience reflects a widespread belief that crimes punishable by one year's imprisonment are not serious enough to warrant a full-fledged trial by common law jury, the latter procedure being reserved for serious crimes.

---

* *Andres* v. *United States*, 333 U.S. 740, 748 (1948); *Patton* v. *United States*, 281 U.S. 276, 288-290 (1930); *Thompson* v. *Utah*, 170 U.S. 343, 347, 350, 353 (1898); *Maxwell* v. *Dow*, 176 U.S. 581, 586 (1900); Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury*, 39 HARV. L. REV. 917, 970 (1926); Comment, *Should Jury Verdicts Be Unanimous in Criminal Cases*, 47 ORE L. REV. 417 (1968).

** Alaska, Arkansas, Georgia, Iowa, Kentucky, Maine, Mississippi, New Hampshire, New York, Oklahoma, Oregon, Rhode Island, Virginia.

† See N.Y. cases cited at n., p. 20, *supra*; *State* v. *Jackson*, 69 N.H. 511, 43 Atl. 749 (1898); see also *Jackson* v. *Commonwealth*, 221 Ky. 823, 299 S.W. 988 (1927); *Knudson* v. *City of Anchorage*, 358 P.2d 375 (Alaska 1960); MCDANEL, THE VIRGINIA CONSTITUTIONAL CONVENTION OF 1901-1902, pp. 111-112 (1928) (jury of fewer than twelve adopted because of the feeling that minor criminal cases did not require the expense of a twelve-member jury); *State* v. *Maier*, 13 N.J. 235, 99 A. 2d 21 (1953) ("disorderly persons" offenses, such as simple assault, punishable by up to one year's imprisonment, are triable without a jury).

The Supreme Court's reference in *Duncan* to these state provisions carries a clear suggestion that a potential one-year sentence does not give rise to a Sixth Amendment right to a jury trial. For, notwithstanding these extensive procedures for trials without Sixth Amendment juries in cases wherein a one-year sentence is permitted, the Court indicated that *Duncan* would have no far-reaching effect on the states:

> "It seems very unlikely to us that our decision today will require widespread changes in state criminal process. First, our decisions interpreting the Sixth Amendment are always subject to reconsideration, a fact amply demonstrated by the instant decision. In addition, most of the states have provisions for jury trials equal in breadth to the Sixth Amendment, if that amendment is construed, as it has been, to permit the trial of petty crimes and offenses without a jury. Indeed, there appear to be only four states in which juries of fewer than 12 can be used without the defendant's consent for offenses carrying a maximum penalty of greater than one year. Only in Oregon and Louisiana can a less-than-unanimous jury convict for an offense with a maximum penalty greater than one year." 391 U. S. at 158, n.30.*

In twenty-eight states a common law jury trial is available for crimes punishable by a maximum term of imprisonment which is less than one year. For example, in Hawaii all offenses punishable by more than thirty days'

---

* Appellee's research indicates that cases with a maximum penalty of imprisonment greater than one year may be tried without a common law jury in the first instance in ten states: Florida, Louisiana, Maryland, Massachusetts, Oregon, North Carolina, Pennsylvania (Philadelphia), South Carolina, Texas and Utah. While Oregon has a one-year cutoff for cases which may be tried by a jury of fewer than twelve persons (see pp. 20-1, *supra*), in cases tried by a twelve-man jury a ten-twelfths verdict is authorized, except cases of murder in the first degree, when a unanimous verdict is required.

imprisonment must be tried with a common law jury, if the defendant chooses. *Territory* v. *Kiyoto Taketa*, 27 Haw. 844, 847-849 (1924); Haw. Rev. Laws §216-7 (1955). In California the defendant is entitled to a twelve-man jury at a trial of any offense punishable by imprisonment. Cal. Const. Art. I, §7; Cal. Penal Code Ann. §§689, 1042 (1956), §190 (amend. 1968). Of course, the laws in these twenty-eight states give little support for appellant's argument that a cutoff of six months is constitutionally required, for only six of these states have the six-month cutoff for cases triable without a common law jury; this hardly compels a constitutional ruling in favor of the six-month boundary. By contrast, in eighteen of these states there is, in effect, no cutoff, since a common law jury trial is available if any imprisonment may be imposed; in addition, two states have a thirty-day cutoff, and in two states no more than three months' imprisonment may be imposed without a common law jury trial. Clearly, such provisions provide no guidelines for this Court for distinguishing between petty and serious cases under the Sixth Amendment; to use appellant's terms (brief, pp. 14-15, n.11), the existence of these low cutoffs "proves too much," since they are well within the six-month line of demarcation which has already been approved by this Court.

F. The historical background of the right to a jury trial supports New York's system.

It is well settled that

> "the word 'jury' and the words 'trial by jury' were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument * * *." *Thompson* v. *Utah*, 170 U.S. 343, 350 (1898).

Imprisonment after trial without a jury was common.

> "At the time of the adoption of the Constitution, there were numerous offenses, commonly described as 'petty,' which were tried summarily without a jury, by justices of the peace in England, and by police magistrates or corresponding judicial officers in the Colonies, and punished by commitment to jail, a workhouse, or a house of correction." *District of Columbia* v. *Clawans*, 300 U. S. 617, 624 (1937).

Included in the offenses subject to trials without juries at common law were violations of laws relating to small thefts, gambling, "cheats," offenses to property, vagabondage, disorderly conduct and smuggling. Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury*, 39 HARV. L. REV. 917, 928 (1926). Appellant Baldwin, vainly striving to justify a six-month cutoff for petty offenses, claims that "historically," that cutoff characterized offenses that were triable without a jury (brief, p. 14). However, the study he cites reached no such conclusion, referring instead to contemporaneous England. Frankfurter & Corcoran, *supra* at 933-934. Of course, at common law specified terms of imprisonment for specific crimes were not the most common form of penalty prescribed, punishment generally consisting of capital punishment, dismemberment, whipping and other corporal punishment, a fine, incarceration for an indefinite period pending payment of the fine or posting of surety, and levy upon the offender's property. *Ibid.*; see also *United States* v. *Moreland*, 258 U. S. 433, 441-451 (1922) (BRANDEIS, J., dissenting); *Ex parte Wilson*, 114 U. S. 417 (1885); 4 BLACKSTONE COMMENTARIES 283 (Cooley Ed. 1899). Consequently, comparisons with present-day punishment are often difficult.

> "It is impossible to determine what term of imprisonment would be an exact equivalent for the pain and disgrace occasioned by 20 stripes laid upon the bare back or by two or three hours' confinement in stocks located near the meeting house, or in some other public place." *State* v. *Jackson,* 69 N.H. 511, 43 Atl. 749, 754 (1899); *cf. Mackin* v. *United States,* 117 U. S. 348, 351 (1886).

However, provisions for specific terms of imprisonment did exist, and "there were petty offenses, triable summarily under English statute, which carried possible sentences of imprisonment for periods from three to twelve months." *District of Columbia* v. *Clawans,* 300 U. S. 617, 626 (1937). Sentences of imprisonment for one year were prescribed for offenses involving certain assaults, rogues and vagabonds, lottery agents, and destruction of tidal barriers. A sentence of a year and a half could be imposed without a jury trial for negligent arson by a servant, and various ne'er-do-wells "might be committed indefinitely unless heavy surety were forthcoming for their indefinite good behavior." Frankfurter & Corcoran, *supra* at 927, 932. Such practices continued in the Colonies. A Maryland statute provided that vagrants in Baltimore County "might be committed by 2 justices for one year unless good security be given." *Id.* at 1007. In Virginia, whose constitution set the pattern for the Sixth Amendment, a person convicted of gaming, a crime triable by a single justice, was subject to a fine of 5 pounds and commitment to jail until he secured sufficient security for his good behavior for 12 months. *Id.* at 1011.

In New Jersey, accused "disorderly persons" were tried without a jury. This practice was continued after the Revolution, and the "disorderly persons" statute was

gradually enlarged to provide a penalty of up to one year's imprisonment for a wide range of offenders, including common thieves and pickpockets. In *State* v. *Maier,* 13 N.J. 235, 99 A.2d 21 (1953), the Supreme Court of New Jersey, in a scholarly opinion by Chief Justice VANDERBILT which reviewed at length the history of summary trials, rejected a claim that the New Jersey statute violated the right to trial by jury contained in the state constitution, a provision identical to the federal Sixth Amendment. The statute was also upheld in New Jersey after the *Duncan* decision. *State* v. *Owens,* 102 N.J. Super. 187, 245 A.2d 736 (1968), *aff'd on other grounds,* 54 N.J. 153, 254 A.2d 97 (1969).

When New York became independent, its first Constitution incorporated into the state's earliest jurisprudence the Colony's ability to try numerous offenses without a jury. Indeed, before the Revolution in some counties it was the practice to try before three justices any person committing "any misdemeanor, breach of the peace or other criminal offense under the degree of grand larceny," if the accused could not provide bail within 48 hours. Frankfurter & Corcoran, *supra* at 945-46. (Petty thieves were also prosecuted in other Colonies without a jury. *Id.* at 943, 955, 992.) As early as 1824, it was recognized in New York that trials of "petit larceny and other small offenses" in courts of Special Sessions would have been an infringement on the right to jury trial guaranteed by the New York Constitution, except that "the first act instituting such Courts * * * was passed by the colonial legislature in 1744 * * * [and] no right of trial by jury ever existed in those Courts." *Jackson* v. *Wood,* 2 Cow. (N.Y.) 819 (1824); *Murphy* v. *People,* 2 Cow. (N.Y.) 815 (1824). Since 1824

a jury of six was provided in Special Sessions in some counties, but that procedure has been upheld on the theory that since no jury at all is required, a number of jurors fewer than that constitutionally required is permissible. See *People ex rel. Comaford* v. *Dutcher,* 83 N.Y. 240 (1880). The appellate courts thus sustained, after the Revolution, trials for "petit larceny, and offences not infamous in their character, under the degree of grand larceny without indictment and without a jury." *Duffy* v. *People,* 6 Hill (N.Y.) 75, 78 (1843). Ultimately, the distinction drawn between serious and petty offenses was the difference between "felonies" and "misdemeanors," with a one-year sentence as the boundary. *People* v. *Bellinger,* 269 N.Y. 265 (1935); *People ex rel. Cosgriff* v. *Craig,* 195 N.Y. 190 (1909); *People ex rel. Comaford* v. *Dutcher,* 83 N.Y. 240, 243 (1880).

But the Court of Appeals has not, as appellant claims, exalted labels above substance. Despite various legislative definitions, the Court of Appeals has held that "it is not the mere name of the crime but the punishment therefor that characterizes it" as a felony or misdemeanor for these purposes. *People ex rel. Cosgriff* v. *Craig, supra* at 197; see *People* v. *Bellinger, supra* at 269. Where the legislature denominated a criminal act a misdemeanor, but prescribed a punishment of more than one year, indictment and a common law jury were required, since the crime was not really a petty offense. *Ibid.* The New York courts thus came to a holding similar to *Duncan's* 60 years earlier.

Since this jurisprudence in New York and New Jersey is based on constitutional provisions with the same roots as the Sixth Amendment, it is persuasive evidence of the meaning of trial by jury in the latter provision.

G. The severity of the punishment authorized for the offense charged is the only reliable test of its seriousness.

Appellant argues that his offense of jostling, while prosecuted as a misdemeanor, was really a completed grand larceny, a felony under present New York law punishable by up to four years in prison [N.Y. Penal Law §§70.00(2)(e), 155.30], and therefore was of such a serious nature as to require trial by jury. This attempt to go beyond the charge and conviction to the "essence" of the offense has no merit. In *Bloom* v. *Illinois,* 391 U.S. 194 (1968), the petitioner claimed that his offense of contempt, committed by filing a spurious and forged will for probate, was really a forgery, punishable in Illinois by 14 years' imprisonment; this Court, however, treated the offense as a contempt, as it had been treated by the State of Illinois. *Id.* at 210-211. In *Dyke* v. *Taylor Implement Mfg. Co.,* 391 U. S. 216 (1968), the petitioners' contempt amounted to an assault with a deadly weapon or an attempted murder, but this Court treated the offense as a contempt. No workable alternative exists. For the charge and conviction are the best evidence of the seriousness with which the acts are treated, and were this Court to look beyond the record for the shadowy "essence" of the offense, it would have to proceed without findings of fact or a definite record of the facts relating to the greater offense. Nor should a defendant be heard to complain that his rights were violated because, in accordance with common practice in large cities with heavy calendars of felony cases, his acts were prosecuted as a misdemeanor rather than as a technical felony.

Also attempting to find the "nature" of his offense in the past, appellant argues that jostling was similar to

picking pockets, a serious offense at common law. Again, there is no need to go beyond the present record to determine the seriousness of the offense. Appellant's strained effort to find an old English equivalent of "jostling," a 20th Century offense unknown at common law or in the Colonies (brief, pp. 24-5), illustrates the difficulties of such an approach. Such analysis generally proceeds without substantial guidance from the common law, and has led to anomalous rulings; for instance, it has been held that certain offenses punishable by only thirty days' imprisonment are serious, *Callan* v. *Wilson*, 127 U. S. 540 (1888), *District of Columbia* v. *Colts*, 202 U. S. 634 (1930), while others punishable by imprisonment for six months or ninety days are not. *Dyke* v. *Taylor Implement Mfg. Co., supra* at 220 (1968); *Frank* v. *United States*, 395 U. S. 147, 150 (1969); *District of Columbia* v. *Clawans*, 300 U. S. 617 (1937). That approach would also multiply litigation and prolong uncertainty, for it would entail a separate determination—perhaps ultimately by this Court—as to countless substantive provisions of a penal code, based upon the supposed common law or Colonial analogy to the specific offense in question; indeed, appellant virtually invites such a piecemeal review as to each of the Class A misdemeanors in the New York Penal Law (brief, pp. 21-3).

Plainly, "the severity of the authorized punishment is the only reliable test" of the seriousness of a crime. *State* v. *Owens*, 54 N.J. 153, 160, 254 A.2d 97, 101 (1969). This is "supported by decisions * * * under constitutional provisions requiring indictment for 'infamous crimes.' Whether a crime is 'infamous' is held to depend upon the punishment that is authorized, without any suggestion that an act

which at common law was deemed an infamous wrong must forever be denounced with like severity. *Ex parte Wilson*, 114 U. S. 417 * * *." *State* v. *Owens, supra*, 54 N.J. at 161, 254 A.2d at 100-101. As the Supreme Court of New Jersey recently stated in the *Owens* case, per WEINTRAUB, C.J.:

> "Our Constitution was not intended to consecrate the common law's treatment of any specific misconduct and thus to bar legislative revaluation of it in the light of changing conditions and mores. Rather the Constitution abstracted from the common law the concept that whether a prosecution must be by indictment and jury trial depends upon the consequences which ensue from a conviction * * * Nor do we think it useful to sample popular opinion to determine how much stigma is attributed to each act of misconduct and thereupon to decide, in some way which escapes us, whether an offense is more than petty notwithstanding the statute has so treated it. It is for the Legislature alone to assay the public's judgment, and the Legislature does so when it prescribes the legal consequences which may attend a conviction * * *." *State* v. *Owens, supra*, 54 N.J. at 159-160, 254 A.2d at 100-101.

Perhaps recognizing the difficulty of ascertaining "the nature of the offense" in every case, this Court appears now to have turned to punishment as the "most relevant indication of the seriousness of an offense." *Frank* v. *United States, supra* at 148; see also *Duncan* v. *Louisiana, supra* at 159.

Appellant points out that "a year's imprisonment is no small matter in any person's life" (brief, p. 16), but the same may be said of six months' imprisonment, or three months'. For most persons, a criminal conviction without any imprisonment is no small matter. A sentence of one

year may be less "serious" to a footloose offender with a long history of prior convictions, such as appellant (App. 20), than to the head of a household with a clean record. But if the issue is resolved, "'not subjectively by recourse of the judge to his own sympathy and emotions, but by objective standards such as may be observed in the laws and practices of the community taken as a gauge of its social and ethical judgments'" [*Frank* v. *United States, supra* at 152; *District of Columbia* v. *Clawans, supra* at 628], the one-year maximum sentence is the most readily justifiable boundary between serious and petty offenses. A predictable standard, it is supported by past and present interpretations of the Fifth and Sixth Amendments, and it is reflected in the jurisprudence and penal provisions of most states and the federal system.

POINT II

The limitation of six-man juries to misdemeanor trials conducted outside of New York City is not arbitrary, and therefore did not deprive appellant of the equal protection of the laws.

Under a New York legislative scheme originating in 1824, in the lower criminal courts outside of New York City accused misdemeanants are entitled, on demand, to be tried by a jury of six persons. N.Y. Code Crim. Proc. §§701, 710. Appellant alleges that he was denied equal protection of the laws because no six-man jury is available in the New York City Criminal Court.

Before turning to the refutation of this claim, the argument may be placed in proper context. It must be assumed

in this discussion that a jury trial is not required by the Sixth Amendment for misdemeanor cases in New York City; otherwise, there would be no need to treat the issue of equal protection. Moreover, a six-man jury would not satisfy the requirement of a jury trial under the federal constitution, or even under New York's constitution (see Point I, *supra*); indeed, the New York Constitution authorizes the legislature to draw the distinction it has drawn (App. 30, n. 2). Therefore, it does not advance the discussion of the equal protection issue to assert, as appellant does, that the right to a trial before a six-man panel is a "fundamental right" under the federal and state constitutions (brief, pp. 9, 43-4).

From this faulty premise appellant claims that where such "fundamental right" is involved, any classification which reduces the exercise of that right is unconstitutional, " 'unless shown to be necessary to promote a *compelling* governmental interest' " (brief, pp. 43-4), quoting *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969). However, the burden of showing a compelling state interest to justify a classification is imposed only when a federal constitutional right is impaired, such as the right to vote or, as in *Shapiro* v. *Thompson*, the "constitutional right" to move "from State to State."

Thus, appellant's equal protection argument reduces to this: even assuming that New York State does not have to provide a six-man jury in a misdemeanor case anywhere within its boundaries, if it provides such a jury somewhere in the state it must do so everywhere. This argument is without merit.

"Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland,* 366 U.S. 420, 425-426 (1961).

In the case at Bar, the legislative classification is territorial, and readily justifiable, for "territorial uniformity is not a constitutional prerequisite." *Id.* at 427.

In *Salsburg* v. *Maryland,* 346 U.S. 545 (1954), this Court held that the equal protection clause was not violated by a Maryland statute that made evidence obtained by illegal search or seizure generally inadmissible in prosecutions for misdemeanors, but permitted such evidence in prosecutions for certain gambling misdemeanors in one specified county. The Court quoted from an opinion in an earlier case which disposes of the present claim of denial of equal protection:

"There is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so * * *

> "Where part of a State is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions,—trial by jury in one, for example, and not in the other. Large cities may require a multiplication of courts and a peculiar arrangement of jurisdictions. It would be an unfortunate restriction of the powers of the State government if it could not, in its discretion, provide for these various exigencies." *Missouri* v. *Lewis,* 101 U.S. 22, 31-32 (1879), quoted at 346 U.S. at 551, 551 n.6; see also *Ohio* v. *Akron Park District,* 281 U.S. 74, 81 (1930); *Ocampo* v. *United States,* 234 U.S. 91, 98-99 (1914).

In *Missouri* v. *Lewis, supra,* the Court sustained a system in which all appeals from certain counties in Missouri lay directly to the Supreme Court of the state, but appeals in other counties lay to the St. Louis Court of Appeals, with further appeal to the Supreme Court only in cases having a certain minimum amount in controversy. In *Chappell Chemical Co.* v. *Sulphur Mines Co.,* 172 U.S. 474 (1899), the Court upheld a provision in the Maryland Constitution which withdrew the right of trial by jury in the courts of Baltimore without a similar provision for the rest of the state. In *Ocampo* v. *United States, supra,* the Court sustained a system whereby preliminary hearings were not held in Manila in criminal cases prosecuted by information, but were held in such cases in the rest of the Philippines. *Gardner* v. *Michigan,* 199 U.S. 325, 333-334 (1905), rejected a defendant's claim that persons in Wayne County, which includes Detroit, were deprived of equal protection by a statute providing a method for selecting juries in that county different from the method applicable in the rest of Michigan. The *Gardner* and *Lewis* cases were cited in *Morris* v. *Alabama,* 302 U.S. 642 (1937), for the conclu-

sion that no substantial federal question was raised by a defendant, convicted of murder, who claimed that he was denied equal protection by a system of selecting juries applicable in only the most populous county in the state. See also *Hayes* v. *Missouri*, 120 U.S. 69 (1887); *Mallett* v. *North Carolina*, 181 U.S. 589, 597-599 (1901).

The New York system at issue here is one of several throughout the United States in which territorial divisions have been made in provisions for jury trials. The Michigan Supreme Court has upheld the procedure whereby appeals of convictions for minor offenses in Detroit are heard on the record by certiorari, whereas in the rest of Wayne County there is a trial *de novo*. *Walber* v. *Piggins*, 2 Mich. App. 145, 138 N.W.2d 772 (1966). In Kentucky, cities are divided into classes by population and the availability of jury trials for petty offenses differs in each class, the scope of jury trial diminishing as the size of the city increases. Ky. Rev. Stat. chs. 25, 26. In Georgia, a jury in misdemeanor cases ranges in size from five to twelve persons depending on the county; the Criminal Court of Atlanta, for example, tries misdemeanors with juries of five, while in Hall County the same crimes are tried by juries of twelve. Ga. Laws 1890-1891, pp. 935, 939.

Many states, including New York, have differences in appellate procedures which would be void if appellant's theory as to territorial uniformity were correct.* The

* Appeals from the New York City Criminal Court, and from the lower criminal courts in Westchester, Nassau and Suffolk Counties, are heard by a panel of three judges of the Appellate Term of the Supreme Court. N.Y. Code Crim. Proc. §517(2); 22 NYCRR §§640.1, 730.1 (c), (e). In the other counties, appeals from the in-

Supreme Court of California recently rejected arguments similar to appellant Baldwin's, finding no denial of equal protection in that state's laws providing that in counties with municipal courts appeals in misdemeanor cases are heard by a panel of three judges, whereas in other counties, generally the less populous ones, appeals in misdemeanor cases are heard by a single judge. *Whittaker* v. *Superior Court,* 68 Cal.2d 357, 438 P.2d 358 (1968).

The requirement of state-wide uniformity in criminal procedures that appellant proposes would inhibit progress in the administration of justice. A state should not be forbidden from liberalizing procedures by making them available to defendants in certain parts of the state, either as an experiment or because of conditions prevailing in those regions. May a defendant who is arrested at night in an up-State New York county allege denial of equal protection because the experimental night arraignment program recently inaugurated in New York City has not been attempted in his bailiwick? *Cf. N.Y.C. Crim. Justice Coordinating Council, 18-Month Report,* N.Y.L. Jour. Feb. 5, 1969, p. 4, col. 4. Recently, to ease the burdens of the police and courts, a rule was adapted for the New York City Criminal Court permitting the issuance of a summons

---

ferior criminal courts lie to the County Court and are heard by one judge. N.Y. Code Crim. Proc. §517(3).

In New Jersey there is a system for appellate review for misdemeanor convictions which is optional for large counties, N.J. Stat. Ann. §§2A:7-1, 2A:7-20, and differs from the system applicable to the remaining counties. N.J. Stat. Ann. §2A:3-6.

In Minnesota, direct access to the highest court of the state is available only in appeals from the largest county. Minn. Stat. Ann. §§484.63, 488A.01(11).

See also La. Rev. Stat. Ann. §§13:2561.11, 13:2562.11; S.C. Code §§15-601, 15-612, 15-629 *et seq.*; S.D. Code §§32.0905, 32.0906, 32.0911; Va. Code §16.1-106.

in lieu of arrest for persons charged with any offense below the grade of felony committed within the City of New York. 22 NYCRR §2950.10(a). Surely, a person arrested for a misdemeanor in Buffalo has no claim of denial of equal protection because this procedure has not been adopted in his city.

While the burden of establishing the reasonableness of the legislation at issue here is not on the State, *Salsburg* v. *Maryland*, 346 U.S. 545, 553 (1954), we suggest here reasons supporting the classification.

The administrative advantages which in the Colonial period flowed from conducting trials of misdemeanors without juries continue. See *Murphy* v. *People*, 2 Cow. (N.Y.) 815 (1824). As New York City grew and caseloads expanded, severe strains were placed upon the lower criminal court in the City. As recorded in 1954, the Chief Justice of the Court of Special Sessions of New York City, a predecessor of the New York City Criminal Court, pointed to the previous year's calendar of 32,000 cases and the 150% increase in its business between 1945 and 1950, and vigorously complained that its facilities were being overtaxed. N.Y. Times, Jan. 3, 1954, p. 34, col. 1. The court's plight proceeded from bad to worse, and the situation has not been alleviated by the court reorganization of 1962, which combined the Court of Special Sessions and the Magistrates' Courts of New York City in one Criminal Court. Enormous increases in crime and arrests in the 1960's, as well as a proliferation of newly required pre-trial hearings on the validity of searches and seizures, confessions, and eyewitness identifications, are reflected in the long calendars of the Criminal Court, which have fostered the court's reputation as a dispenser of "turnstile justice," a court incapable of coping adequately with the huge volume of cases.

N. Y. Post, Oct. 13, 1969, p. 37. While appellant claims that jury trials would not require many additional judges to cope with the present caseload—a prediction which expressly assumes that three-judge benches would be abolished (brief, pp. 34-5, n.37)—undeniably, jury trials would consume considerable extra personnel, money, and courtrooms. Indeed, with judges' robing rooms presently being used for trials, new court buildings could be required. See *People* v. *Moses,* 57 M.2d 960 (Crim. Ct. N.Y. Co. 1968).

Upon all the evidence, it is also clear that justice would be further delayed. In 1959, the Minnesota Supreme Court held that persons charged in a local court with driving while intoxicated were entitled to a jury trial, because of a state statute requiring uniformity in procedures in such cases. *State* v. *Hoben,* 256 Minn. 436, 98 N.W.2d 813 (1959). "Prior to *Hoben,* the delay in the Minneapolis Municipal Court was approximately three months while after the *Hoben* case the delay was nearly two years." Note, *Right to Jury Trial of Persons Accused of an Ordinance Violation,* 47 MINN. L. REV. 93 (1962).

The problems of court congestion and the enormous expense in administrating justice in the lower courts are inherently harder to resolve in New York City than anywhere else in the state. New York City's population density, a factor directly associated with crime [PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY, pp. 5, 28 (1967)], is more than twice Buffalo's, the second largest city in the state. U.S. CENSUS, STATISTICAL ABSTRACT 1968, p. 21, table 20; RAND-MCNALLY POPULATION ESTIMATES, COMMERCIAL ATLAS AND MARKETING GUIDE 31 (100th ed. 1969). New York City is the national center for narcot-

ics and traffic in drugs—almost half of the nation's addicts are there, more than fifty times as many as live in Buffalo* —and it suffers from the other crimes that addiction produces. As the transportation center in the state, it faces special problems of law enforcement, as is evidenced by the case at Bar.

Consequently, as the Court of Appeals noted in its opinion in this case, in New York City the lower criminal court is burdened with misdemeanor calendars heavier than those found elsewhere in the state. In Buffalo, the City Court disposed of 8,189 non-traffic misdemeanor cases in a recent thirty-month period for which figures are available; in the comparable period the New York City Criminal Court disposed of 321,368 non-traffic misdemeanor cases (App. 32).** Thus, while New York City's population is now 17 times as large as Buffalo's,† its misdemeanor caseload is over 39 times as great. The disparity with New York City's caseload is even greater in the rest of the state (see Appendix E, *infra*). Surely, the New York legislature could reasonably conclude that the problems of administering justice in the lower courts are most urgent in New York City. Nor was the legislature required to abolish six-man juries in the rest of the state to preserve appellant's right to equal protection.

---

* U.S. Treas. Dept., Bureau of Narcotics, Traffic in Opium and Other Dangerous Drugs for Period Ended Dec. 31, 1967, pp. 47, 52.

** July, 1966 through December, 1968. Records are compiled by fiscal year, not calendar year. Since statistics as to traffic cases in Buffalo, unlike New York City, do not distinguish between misdemeanors and violations, all traffic cases have been excluded to enable comparison with the New York City Criminal Court. Source: Office of the State Administrator of the Judicial Conference of the State of New York.

† RAND-MCNALLY POPULATION ESTIMATES, COMMERCIAL ATLAS AND MARKETING GUIDE 31 (100th ed. 1969).

While appellant cavalierly dismisses administrative burdens, delays and expense as proper grounds for a judicial determination as to the scope of criminal procedures, such matters have been cited by this Court as justifying the withholding of jury trials for petty offenses [*Duncan* v. *Louisiana, supra* at 160], and for denying the retroactivity of the Sixth Amendment right to a jury trial for serious offenses. See *De Stefano* v. *Woods,* 392 U.S. 631 (1968).

The reasonableness of withholding six-man "juries" in New York City is confirmed by this Court's recognition that a fundamentally fair trial does not require even a common law jury. The denial of retroactive effect to *Duncan* reflects, in part, the view that the absence of a jury does not significantly affect the reliability of the fact-finding process. Indeed, it is common experience that juries are subjected to histrionics and emotional arguments which would not influence judges. This Court's preference for judges over juries in passing on questions of fact raised by constitutional claims was expressed in *Jackson* v. *Denno,* 378 U.S. 368 (1964); see also *Bruton* v. *United States,* 391 U.S. 123 (1968). Nor has it been established that judges are more likely to convict than juries.* A recent study of jury trials concluded that the jury is "not so much * * * an institution with a built-in protection for the defendant, but rather * * *

---

* The president of the Legal Aid Society in New York City recently reported that 49% of the Society's clients who were tried in the New York City Criminal Court in 1967 (without a jury) were acquitted; there were 3,023 convictions after trial, 2,678 acquittals after trial. Speech at annual Judicial Conference of the Second Judicial Circuit of the United States, Lake Placid, N.Y., Sept. 14, 1968, reprinted in N.Y.L. Jour., Sept. 25, 1968, p. 1. The records as to completed trials of all persons on misdemeanor charges show that almost half of the defendants are acquitted (see Appendix D II, *infra*).

an institution which is stubbornly non-rule minded." KALVEN & ZEISEL, THE AMERICAN JURY, 375, 495 (1966).

In sum, there being no overriding urgency for jury trials of petty offenses, a legislature may rationally conclude that "the possible consequences to defendants from convictions for petty offenses" are "insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting in the availability of speedy and inexpensive non-jury adjudications" [*Duncan* v. *Louisiana, supra* at 160], and that juries may be dispensed with in trials of petty offenses in cities with unique problems of court congestion, expense and delay.

The rational basis for the New York Legislature's territorial classification is not vitiated by the provision for a three-judge bench in the New York City Criminal Court (see appellant's brief, pp. 34-5). No doubt a more comprehensive attack on the problems of the New York City Criminal Court would include removal of the historic three-judge bench, but its survival is justifiable as an amelioration of the problems attributed to the absence of jury trial by critics of the New York system.* As was said in *Norvell* v. *Illinois*, 373 U.S. 420, 424 (1963): "The 'rough accom-

* "Use of a multi-judge court would appear to have some of the benefits of a jury trial. There will be an opportunity and necessity for a group judgment; there is not the risk of coming before a single judge with a fixed point of view with respect to certain kinds of cases; and it may be that a multi-judge court would be less reluctant than a single judge to act in mitigation. Thus, apart from the question of whether the limitation of jury trials in New York City can be justified, trial by a multi-judge court deserves consideration as an alternative where jury trial is not permitted or is waived." AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY (tent. draft 1968) 22-23.

modations' made by Government do not violate the equal protection clause of the Fourteenth Amendment unless the lines drawn are 'hostile or invidious.' "

Attempting to buttress his collapsing equal protection claim, appellant relies on decisions of this Court establishing the principle of "one man, one vote." However, those decisions do not forbid reasonable differences in procedure in different political subdivisions. After those decisions this Court, citing *Salsburg* v. *Maryland, supra,* upheld Congress's limitation of the provisions of the Voting Rights Act of 1965 to a small number of states and political subdivisions where Congress could reasonably conclude the problem of voting discrimination was readily established to be most serious. *South Carolina* v. *Katzenbach,* 383 U.S. 301, 328 (1966); see *New York State Association of Trial Lawyers* v. *Rockefeller,* 267 F. Supp. 148 (S.D.N.Y. 1967); *Whittaker* v. *Superior Court, supra,* 68 Cal.2d 357, 438 P.2d 358, 368 (1968). In the Reapportionment Cases, all persons in the geographical area (the entire state) that was established for the political function were not treated alike, votes for the state-wide legislature being weighted unequally. In the present case, by contrast, every accused misdemeanant in New York City, the area designated for the jurisdiction of the New York City Criminal Court, is treated alike. There is no suggestion in the reapportionment decisions that a state legislature is required to designate the entire state as the single geographical unit for all purposes, including the running of local government, or the administration of inferior criminal courts. The Mayor and four Trustees of the Village of Cazenovia, New York, population 2,685, perform the same functions within their geographical area

as the 37 councilmen of New York City, representing eight million persons. The New York City resident is disadvantaged in comparison with his counterpart in Cazenovia, whose access to his elected representatives is much more direct and whose vote "counts" more in an election for the local legislature. Similarly, the accused misdemeanant in New York City is disadvantaged in comparison with his counterpart in Cazenovia, in that he has no option for a six-man jury. On the other hand, he can be tried by three judges, and his appeal will be heard by three judges, while the case of his Cazenovia counterpart will be heard by one judge at trial and one judge on appeal (see note, p. 36, *supra*). None of these situations involves a denial of equal protection. The state has a free hand in dividing its territory into areas for the performance of public functions, and so long as all citizens in an area designated are treated equally, no denial of equal protection occurs, even if in a neighboring area the function is performed differently.

Nor does *Baxstrom* v. *Herold*, 383 U.S. 107 (1966) support appellant Baldwin. In *Baxstrom*, the law provided for a jury trial before civil commitment to a mental institution. Baxstrom, however, having concluded a prison term, was summarily certified insane and sent to a mental institution without a jury trial. Denial of equal protection was found, since Baxstrom legally was a free man when his prison sentence expired, and he was thus entitled to the same procedures available to non-prisoners. In *Baxstrom*, everywhere in the state mental health system the question whether a person required hospitalization was determined by a jury; having provided that procedure for all other persons in the state, the legislature could not withhold it

from criminal defendants who had served their terms, no reason having been offered for the distinction. *Baxstrom,* then, would be analogous to the present case only if appellant Baldwin had been convicted in New York City without a trial, or if he had been convicted in a county outside of New York City without the option of trial by a six-man panel. But the distinction at issue here is plainly rational.

POINT III

If this Court holds that a jury trial was constitutionally required in this case, the holding should not be retroactive to other cases already tried.

If, contrary to appellee's arguments, this Court accepts appellant Baldwin's view of the Sixth Amendment or the equal protection clause of the Fourteenth Amendment, the question of retroactivity would eventually arise, and would best be decided in this case to avoid future uncertainty. Soon after *Duncan* v. *Louisiana,* 391 U.S. 145 (1968), this Court held that the *Duncan* decision would apply only to cases in which the trial was begun after the date of *Duncan. De Stefano* v. *Woods,* 392 U.S. 631 (1968). Similarly, a broadening in the instant case of the Sixth Amendment and the Fourteenth Amendment along the lines proposed by appellant should apply only to his case, and to trials begun after this Court's decision is handed down.

The factors which call for the prospectivity of the *Duncan* decision also apply here. Drastic disruption of the administration of justice would flow from applying the new ruling to cases already tried. Thousands of convictions entered since *Duncan* would be needlessly overturned,

the cases re-opened. This chaos would not be required by justified concern that the fact-finding process previously employed in the New York City Criminal Court, a trial before a court without jurors, was unreliable (see Point II, *supra*, pp. 40-1). Finally, it is indisputable that New York State courts, prosecutors and other officials justifiably have relied on a conclusion that a jury trial was not constitutionally required in misdemeanor cases in the New York City Criminal Court. Bench trials had been the practice, undisturbed by this Court, from the inception of New York's statehood, and the *Duncan* decision did not vitiate that reliance.

Indeed, this Court in *Duncan* tendered strong suggestions that a potential one-year sentence did not require a jury trial. The Court deemed significant the fact that

> "in 49 out of the 50 states crimes subject to trial without a jury * * * are punishable by no more than one year in jail." 391 U.S., at 161.

Bloom v. *Illinois*, 391 U.S. 194 (1968) contains a similar suggestion that one year's imprisonment is an acceptable boundary between serious and petty offenses under the Sixth and Fourteenth Amendments. In *Bloom*, the Court, having decided "to treat criminal contempt like other crimes insofar as the right to jury trial is concerned" [*id.*, at 210], invalidated a sentence of two years for criminal contempt which was imposed without a jury trial. Referring to the diverse and confusing provisions in the various states as to the scope of punishment for criminal contempt, the Court concluded, in an opinion by Mr. Justice WHITE:

> "It is clear, however, that punishment for contempt is limited to one year or less in over half the States." *Id.*, at 206-207, n. 8.*

Since neither *Duncan* nor *Bloom* involved a one-year sentence, the Court's repeated references to the one-year cut-off was noteworthy in New York.

The reasonableness of continuing the New York practice after *Duncan* is confirmed by the request of New York State in the *Duncan* case that the present New York system be preserved. The Attorney General of New York, in his *amicus curiae* brief in *Duncan*, referred the Court to the New York City Criminal Court Act, and concluded:

> "The Court should render a decision which does not interfere with trial without a jury in the class of criminal prosecution in which it is permitted in New York."

Moreover, when the Court held that *Duncan* was not retroactive, it emphasized that

> "both *Duncan* and *Bloom* left open the question whether a contempt punished by imprisonment for one year is, by virtue of that sentence, a sufficiently serious matter to require that a request for jury trial be honored." *De Stefano* v. *Woods*, *supra* at 633.

From all appearances, the Court carefully avoided invalidating the New York statutes, though it easily could have disposed of the matter and prevented the instant litigation

---

* Appellee's research indicates that in 16 states no limit is placed on the sentence which may be imposed without a jury trial for criminal contempt; in three states, a maximum sentence of one year may be imposed without a jury trial. Kan. Gen. Stat. Ann. §§20-1204, 21-111 (1964); N.D. Cent. Code Ann. §§5-01-22 (1960), 42-02-10 (1968); S.D. Code §§13.0607, 13.1235, 33.3703 (Supp. 1960).

on the issue. Undeniably, continued reliance on the validity of the New York system was reasonable, even after *Duncan*.

It might be argued, however, that if appellant's views on the merits are accepted, the Court's ruling in this case must apply to cases tried since the *Duncan* decision, on the theory that this Court's ruling would stem from *Duncan*. Using *Duncan* for a cutoff date (May 20, 1968) would be totally unwarranted. To begin with, there was no indication in the *Duncan* opinion that a jury trial in the case at bar is entailed by *Duncan*. The instant case, not *Duncan*, would be the case that announced the previously undetermined boundaries of petty offenses, or the equal protection clause as it applies to territorial distinctions within a state. Thus, the date of *Duncan* would be irrelevant to the question of retroactivity.

Although *Duncan* would be a steppingstone in the new direction pointed out by appellant, there is ample precedent for holding that the present case, not any prior case, would be the appropriated landmark for determining which cases should be affected by the new rule. The Court has frequently chosen the date of a new decision, not previous cases on which it was based, as a starting date for its applicability. For example, when the Court ruled in *Malloy* v. *Hogan*, 378 U.S. 1 (1964), that the Fifth Amendment privilege against self-incrimination was applicable to the states, it was a foregone conclusion that state judges and prosecutors would soon be barred from commenting at trial upon the defendant's failure to testify. Yet, when the Court did hold that such comment was forbidden, in *Griffin* v. *California*, 380 U.S. 609 (1965), that holding was not applied to cases that were already final, even if such cases were tried after *Malloy* v. *Hogan*. *Tehan* v. *Shott*, 382 U.S.

406 (1966). Similarly, *Miranda* v. *Arizona,* 384 U.S. 436 (1966) was an outgrowth of *Malloy* v. *Hogan* and of rulings applying the Sixth Amendment right to counsel, including *Escobedo* v. *Illinois,* 378 U.S. 478 (1964). But *Miranda* was not applied to cases tried prior to its announcement. *Johnson* v. *New Jersey,* 384 U.S. 719 (1966). Prior constitutional rulings were also the foundation of *United States* v. *Wade,* 388 U.S. 218 (1967), which held that the right to counsel attached at a line-up. See *Gideon* v. *Wainwright,* 372 U.S. 335 (1963); *Escobedo* v. *Illinois, supra.* But here again the decision was held inapplicable to cases arising previously, even though such cases might have arisen after *Gideon* and *Escobedo. Stovall* v. *Denno,* 388 U. S. 293 (1967); see also *Desist* v. *United States,* 394 U. S. 244 (1969).

In so urging, we mean to suggest not at all that there is any merit to appellant's interpretation of the Sixth and Fourteenth Amendments. As has been shown above, the New York procedure is consistent with those provisions.

Conclusion

The judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

MICHAEL R. JUVILER
LEWIS R. FRIEDMAN
DAVID OTIS FULLER, JR.
JOAN C. SUDOLNIK
Assistant District Attorneys
Of Counsel

October, 1969

We gratefully acknowledge the assistance in the preparation of this brief and the appendices to this brief provided by the following law students from New York University, Columbia, George Washington and St. John's Law Schools:

Clifford V. Aaron, Jeffrey S. Dunay, Amos Gern, Leonard A. Goldman, Arnold J. Haiman, Jonathan E. Jacobs, Robert N. Kaye, Nolan C. Leake, Joel Morgenthau, Max R. Shulman.

APPENDIX A

ONE-YEAR SENTENCE CUTOFF BETWEEN PETTY AND SERIOUS OFFENSES IN THE UNITED STATES

I. Misdemeanor/Felony Distinction, Maximum Imprisonment for Misdemeanor Is One Year

The felony-misdemeanor distinction exists in every state. In all of the following twenty-eight states (including New York) and the federal system, the maximum sentence of imprisonment for a misdemeanor is one year, for a felony a longer term.

United States:	18 U.S.C. §1
Alaska:	Alaska Stat. Ann. §§11.05.150, 11.75.030 (1962)
Arkansas:	Ark. Stat. Ann. §§41-102, 41-103, 41-104, 41-106 (1964)
California:	Cal. Pen. Code Ann. §17
Colorado:	Col. Const. Art. XVIII, §4; Col. Stat. Ann. §§39-10-19, 39-12-1 (1963)
Connecticut:	Conn. Gen. Stat. Ann. §§1-1, 54-117, Conn. Gen. Stat. (1902) §1528
Georgia:	Ga. Code Ann. §26-401 (1969)
Hawaii:	Hawaii Rev. L. §247-2 (1955), §701-2
Illinois:	Ill. Rev. Stat. c.38, §§1-7, 22-7, 22-11 (1965)
Iowa:	Iowa Code Ann. §687.7 (1950)
Kansas:	Kan. Stat. Ann. §21-109, &21-112 (1964)

Maine:	Me. Rev. Stat. Ann. tit. 15, §§451, 1703 (1964); *Ex parte Gosselin,* 41 Me. 412, 44 A.2d 882 (1945); *Smith* v. *State,* 145 Me. 313, 75 A.2d 538 (1950).
Minnesota:	Minn. Stat. Ann. §§609.02, 59.165 (1964)
Missouri:	Mo. Ann. Stat. §§556.020, 556.030, 556.040, 556.270, 556.490 (1953)
Nevada:	Nev. Rev. Stat. §193.120 (1967)
New Hampshire:	N.H. Rev. Stat. Ann. §§594:1, 607:9, 607:11 (1955)
New Mexico:	N.M. Stat. Ann. §40A-1-5, 40A-1-6 (1964)
New York:	N.Y. Penal L. §§70.00, 70.15 (1967)
North Dakota:	N.D. Cent. Code Ann. §§12-01-07, 12-06-10, 12-06-14 (1960)
Ohio:	Ohio Rev. Code Ann. §§1.05, 1.06 (1969)
Oklahoma:	Okla. Stat. Ann. tit. 21, §§4, 5, 6, 9, 10 (1961); *State* v. *Young,* 20 Okla. Crim. 383, 203 Pac. 484 (1922).
Oregon:	Ore. Rev. Stat. §161.030, 161.080 (1965).
Rhode Island:	R.I. Gen. Laws §11-1-2 (1956).
South Dakota:	S.D. Comp. L. §§22-1-4, 22-6-1, 22-6-2 (1967)
Tennessee:	Tenn. Code Ann. §§39-103, 39-104, 39-105, 40-408 (1955); *Spurgeon* v. *Worley,* 169 Tenn. 697, 90 S.W.2d 948 (1936)

Virginia:	Va. Code Ann. §§18.1-6, 18.1-9 (1968)
Washington:	Wash. Rev. Code Ann. §§9.01.020, 9.92.010, 9.92.020, 9.92.030 (1967)
West Virginia:	W. Va. Code Ann. §61-11-1 (1966)
Wyoming:	Wyo. Stat. Ann. §§6-2, 6-6, 6-7 (1957)

PROPOSED CODES:

Delaware:	Proposed Del. Crim. Code, Gov. Com. for Rev. Crim. Law (1967) (same as N.Y.)
Michigan:	Proposed Mich. Crim. Code (Class A misdemeanor, one-year maximum)
Model Penal Code:	§§1.04(a), 6.08 (1962 ed.) (misdemeanor, one-year maximum)

II. Misdemeanor/Felony Distinction, Maximum Imprisonment for Misdemeanor Is One Year to Be Served in State Prison or State Penitentiary

In the following twenty-two states (including New York), misdemeanors are punishable by a maximum term of imprisonment of one year (Appendix AI, *supra*), and all misdemeanor sentences are served in a county jail or other local jail, all felony sentences in a State Prison or State Penitentiary. See also 28 U.S.C. §4083.

Arkansas:	Ark. Stat. Ann. §41-03 (1964); *Allgood* v. *State*, 206 Ark. 699, 177 S.W.2d 928 (1944)
Colorado:	Col. Const. art. XVIII, §4

Appendix A

Illinois:	Ill. Rev. Stat. c.38, §§1-7, 2-7, 2-11 (1965)
Iowa:	Iowa Code Ann. §§687.2, 687.3, 687.4 (1950)
Kansas:	Kan. Stat. Ann. §§21-112, 62-104 (1964)
Maine:	Me. Rev. Stat. Ann. tit. 15, §§1703, 1791 (1964); *Ex parte Gosselin,* 41 Me. 412, 44 A.2d 882 (1945)
Minnesota:	Minn. Stat. Ann. §609.105 (1964)
Missouri:	Mo. Ann. Stat. §556.020, 556.040 (1953)
Nevada:	Nev. Rev. Stat. §§193.130, 193.140, 193.150 (1967)
New Hampshire:	N.H. Rev. Stat. Ann. §§607:9, 607:11 (1955)
New Mexico:	N.M. Stat. Ann. §§40A-29-3, 40A-29-4 (1964)
New York:	N.Y. Penal L. §70.20 (1967)
North Dakota:	N.D. Cent. Code Ann. §§12-06-10, 12-06-14 (1960)
Ohio:	Ohio Rev. Code Ann. §§1.05, 1.06 (1969); §§2949.08, 2949.12 (1954)
Oklahoma:	Okla. Stat. Ann. tit. 21, §§5, 6 (1961); *State* v. *Young,* 20 Okla. Crim. 383, 203 Pac. 484 (1922)
Oregon:	Ore. Rev. Stat. §161.030 (1965)
South Dakota:	S.D. Comp. L. §§22-1-4, 22-6-1, 22-6-2 (1967)

Tennessee:	Tenn. Code Ann. §§39-104, 39-105 (1955)
Virginia:	Va. Code Ann. §18.1-6 (1968)
Washington:	Wash. Rev. Code Ann. §9.01.020 (1967)
West Virginia:	W.Va. Code Ann. §61-11-1 (1966)
Wyoming:	Wyo. Stat. Ann. §6-2 (1957)

III. Right Not to Be Prosecuted Except by Grand Jury Indictment for Crimes Punishable by More Than One Year's Imprisonment

While almost every state has a procedure for indictment or presentment by a grand jury, in most states there is no right not to be held to answer for crimes without an indictment or presentment. However, in almost every state (including New York) which provides that right, and in the federal system, the cutoff for crimes that may be prosecuted without a right to accusation by a grand jury is a maximum sentence of one year's imprisonment.

United States:	Fed. R. Crim. Proc. 7(a)
Alaska:	Alaska Const. Art. I §8 (1959); *State* v. *Shelton*, 368 P.2d 817, 818 (1962) (follows federal law)
Georgia:	*Webb* v. *Henlery*, 209 Ga. 447, 74 S.E. 2d 7 (1953); *Perry* v. *State*, 54 Ga. 410, 187 S.E. 895 (1936)
Illinois:	Ill. Const. art. I, §8; Ill. Rev. Stat. c.38, §1-7(f) (1965); *Brewster* v. *People*, 183 Ill. 143, 55 N.E. 640 (1900)

Maine:	Me. Rev. Stat. Ann. tit. 4, §165; tit. 15 §§451, 701, 1703 (1964); *Ex parte Gosselin,* 41 Me. 412, 44 A.2d 882 (1945); *Smith* v. *State,* 145 Me. 313, 75 A.2d 538 (1950).
New Hampshire:	N.H. Rev. Stat. Ann. §§594:1, 601:1 (1955)
New York:	N.Y. Const. art. I, §§2, 6, art. VI, 618; *People* v. *Bellinger,* 269 N.Y. 265 (1935)
Virginia:	Va. Code Ann. §19.1-162 (1960)
West Virginia:	W. Va. Const. art. 3, §4; W. Va. Code Ann. §§52-2-7, 62-2-1 (1967)
Wyoming:	Wyo. Const. art. I, §§9, 13; Wyo. Stat. Ann. §§6-2, 6-6, 6-7 (1957)

IV. Typical Collateral Consequences of Conviction of Crimes Punishable by More Than One Year's Imprisonment

Disenfranchisement:

Forty-two states have provision for disenfranchising convicted felons. *Green* v. *Board of Elections,* 380 F.2d 445, 450 (2d Cir. 1967), *cert. denied* 389 U. S. 1048 (1968). In twenty-six of these states, including New York, felonies are punishable by more than one year's imprisonment, misdemeanors by up to one year's imprisonment (Appendix AI, *supra*).

Appendix A

Disqualification from Holding Public Office and Office of Honor and Trust:

Such disqualifications are prescribed in the federal system and ten states, including New York, for conviction of felonies punishable by more than one year's imprisonment. 18 U.S.C. §201; Cal. Const. art. XX, §11; Col. Stat. Ann. §§39-10-17, 39-10-18; Hawaii Sess. Laws A. 250 (1969); Iowa Code §66.1; Kansas 1969 Sess. Laws, c.18, §21-4615 (eff. July 1, 1970); Mo. Ann. Stat. §§129.420, 557.490, 558.-130, 559-470; N.M. Stat. Ann. §40A-29-14; N.Y. Civil Rts. Law §79; Ohio Rev. Code §2961.01; Ore. Rev. Stat. §137-250.

Divorce:

Conviction of a felony is a ground for divorce in almost every state. BOARDMAN'S N.Y. FAMILY LAW, Chart of Divorce Law (1967).

APPENDIX B

COLLATERAL CONSEQUENCES IN NEW YORK OF CONVICTIONS OF AN OFFENSE

I. Convictions of any Felony

a. Mandatory forfeitures or disabilities:

Right to register for or vote at any election [ELEC. LAW §152]

Forfeiture of all public offices [CIV. RTS. LAW §79]

Supension of all civil rights [CIV. RTS. LAW §79]

Supension of private trusts, powers and authorities [CIV. RTS. LAW §79]

Disbarment of attorneys [JUDI. LAW §90(4)]

Service on a New York jury [JUDI. LAW §§504(6), 596(4), 662(4)]

Ineligibility for civil certification as a narcotic addict under the Narcotic Addiction Control Program [MENTAL HEALTH LAW §210(2)]

Denial of the following professional licenses: physicians, osteopaths, physiotherapists, veterinarians, pharmacists [EDUC. LAW §§6502, 6702, 6804]

Denial of a license to operate a billiard room [GEN. BUS. LAW §461]

Denial of a license to operate a watch, guard or patrol agency [GEN. BUS. LAW §74(2)]

Denial of a license to work as a junk dealer or private investigator [GEN. BUS. LAW §§60, 74(2)]

Appendix B

Denial, revocation or suspension of licenses for the following occupations or activities: pier superintendents, hiring agents, stevedores, port watchmen, checkers, solicitors for union dues [UNCONSOL. LAWS §§9814(b), 9818, 9821(e), 9824, 9841, 9844, 9918, 9933 (McKinney 1961)]

Denial of a license to carry firearms [PEN. LAW §400.00]

Denial of a license to work as a professional bondsman [INS. LAW §331; CODE CRIM. PROC. §554-b]

b. Discretionary forfeitures:

Revocation or suspension of the following licenses or certifications: physicians, osteopaths, physiotherapists, dentists, dental hygienists, pharmacists, nurses, podiatrists, optometrists, professional engineers, land surveyors, architects, landscape architects, certified public accountants, psychologists, certified social workers, civil service employment [EDUC. LAW §§6514, 6612, 6804, 6911, 7011, 7018, 7210, 7308, 7327, 7406, 7607, 7707; CIV. SERV. LAW §50(4)]

II. Conviction of any Misdemeanor

a. Mandatory forfeitures:

Denial of a license to work as a professional bondsman [INS. LAW §331; CODE CRIM. PROC. §554-b]

b. Discretionary forfeitures:

Disbarment of attorneys [*In re Hughes*, 188 App. Div. 520 (1st Dept. 1919)]

Appendix B

Revocation or suspension of the following licenses or certifications: physicans, osteopaths, physiotherapists, optometrists, certified public accountants, civil service employment [EDUC. LAW §§6514, 7108, 7406; CIV. SERV. LAW §50(4)]

III. Conviction of Certain Misdemeanors or Violations

a. Mandatory forfeitures:

Service on a New York jury [JUDI. LAW §§504(6), 596(4), 662(4)] (misdemeanors involving moral turpitude)

Denial of licenses to work as private investigators or to operate watch, guard or patrol agencies [GEN. BUS. LAW §74(2)] (illegal possession of dangerous weapons, burglar's tools, stolen property or narcotic drugs, unlawful entry of a building, aiding escape from prison, jostling, fraudulent accosting, loitering for the purpose of engaging or soliciting another person to engage in deviate sexual behavior, eavesdropping)

Denial of licenses to work as junk dealers [GEN. BUS. LAW §60] (larceny or knowingly receiving stolen property)

Denial, revocation or suspension of licenses to engage in the following occupations or activities: pier superintendents, hiring agents, stevedores, port watchmen, checkers, solicitors for union dues [UNCONSOL. LAWS §§9814(b), 9818, 9821(e), 9824, 9841, 9844, 9912, 9913, 9918, 9933 (McKinney 1961)] ("high misdemeanors", illegal possession of a dangerous weapon, burglar's tools or narcotics, buying

or receiving stolen property, unlawful entry of a building, aiding escape from prison, coercion, any crime or offense relating to gambling, bookmaking, pool selling or lotteries if committed at or on a pier or other waterfront terminal or within 500 feet thereof)

Denial of a license to carry firearms [PEN. LAW §400.00; CODE CRIM. PROC. §552] (illegal possession or use of a dangerous weapon, possession of burglar's tools, criminal possession of stolen property, escape, jostling, fraudulent accosting, loitering for the purpose of engaging or soliciting another person to engage in deviate sexual behavior, endangering the welfare of a child, obscenity and related offenses, issuing abortional articles, permitting or promoting prostitution, any sex offense, any drug offense)

b. Discretionary forfeitures:

None

IV. Other

a. Mandatory forfeitures:

Denial of pharmacist's license [EDUC. LAW §6804] (gross immorality)

Denial of a license to carry firearms [PEN. LAW §400.00] (lack of good moral character)

Denial of a license to work as a professional bondsman [INS. LAW §331; CODE CRIM. PROC. §554-b] (lack of good character or conviction of any offense)

Appendix B

b. Discretionary forfeitures:

Revocation or suspension of the following professional licenses: dentists, dental hygienists, pharmacists, nurses [EDUC. LAW §§6612, 6804, 6911] (gross immorality)

The following occupational and business licensing provisions require that an applicant be of "good character" before a license will issue:

Exhibitions and performances [N.Y.C. ADM. CODE §B-32-10.0]; motion picture theatre licenses [*Id.* §B-32-25.0]; billiard and pool table licenses [*Id.* §B-32-45.0]; bowling alleys [*Id.* §B-32-46.0]; shooting galleries [*Id.* §B-32-47.0]; miniature golf courses [*Id.* §B-32-48.0]; sidewalk stands [*Id.* §B-32-59.0]; sightseeing guides [*Id.* §B-32-75.0]; public cartmen [*Id.* §B-32-92.0]; expressmen [*Id.* §B-32-97.0]; public porters [*Id.* §B-32-106.0]; junk dealers [*Id.* §B-32-114.0]; auctioneers [*Id.* §B-32-138.0]; laundries [*Id.* §B-32-167.0]; locksmiths [*Id.* §B-32-182.0]; massage operators [*Id.* §B-32-193.0]; bathing establishments [*Id.* §B-32-197.0]; rooming houses [*Id.* §B-32-219.0]; garages and parking lots [*Id.* §B-32-250.0]; commercial refuse removal [*Id.* §B-32-267.0]; coffee houses [*Id.* §B-32-310.0]; public dance halls, cabarets and catering establishments [*Id.* §B-32-296.0].

APPENDIX C

SURVEY OF PROVISIONS FOR JURY TRIAL

I. No Common Law, Sixth Amendment Jury Trial for Offenses Punishable by Imprisonment for a Maximum of One Year

(a) Fewer than twelve jurors

The following nine states provide a jury of fewer than twelve persons for the trial of criminal offenses carrying a maximum penalty of one year. The constitutional right to a jury trial has been held to require a jury of twelve persons. Patton v. United States, 281 U. S. 276, 288, 290 (1930); Maxwell v. Dow, 176 U. S. 581, 586 (1900); Thompson v. Utah, 170 U. S. 343, 349, 350, 353 (1898); Rasmussen v. United States, 197 U. S. 516 (1905); People ex rel. Frank v. McCann, 253 N.Y. 221, 225-226 (1930); People ex rel. Eckler v. Clark, 23 Hun. 374, 376 (1881); People ex rel. Murray v. Justices, 74 N.Y. 406 (1878); People ex rel. Comaford v. Dutcher, 83 N.Y. 240 (1880).*

Alaska: CONSTITUTION, Art. I, §11; ALASKA STAT. ANN., §§11.75.030, 22.15.060, 22.15.150 (1962) (Jury of six in district magistrate's courts, which have jurisdiction of misdemeanors, punishable by up to one year's imprisonment).

Georgia: CONSTITUTION, Art. I, §2-105, Art. VI, §2-5101, Art. VII, §2-3601; GA. CODE ANN. §26-101, 27-2506 (1965); GA. LAWS 1890-91, pp. 935, 939 (In county criminal courts, which have jurisdiction of misdemeanors—cases in which the maximum sentence imposable is a fine of up to $1000 or imprisonment for a term of up to twelve months or both

* In five other states—Florida, Louisiana, South Carolina, Texas and Utah—juries of fewer than twelve persons are authorized in trials of offenses punishable by more than one year's imprisonment.

—a defendant may demand a jury trial. Depending upon the county, however, a jury ranges in size from five to twelve persons. The Criminal Court of Atlanta, for example, tries misdemeanors with juries of five. In Hall County the same crimes are tried by juries of twelve).

Iowa: CONSTITUTION, Art. 1, §§9, 10; IOWA CODE ANN., §§602.15, 602.25, 602.39, 687.7 (1950) (Jury of six in municipal courts, which have jurisdiction of misdemeanors, carrying a maximum fine of $500 or imprisonment for one year or both).

Kentucky: CONSTITUTION, §§7, 11, 248; KY. REV. STAT. ANN., §§25.010, 25.014, 26.400, 29.015 (1963) (Misdemeanors, carrying a maximum penalty of $500 or twelve months' imprisonment, are tried in inferior courts by a jury of six).

Mississippi: CONSTITUTION, Art. 3, §31, Art. 6, §171; MISS. CODE ANN. §§1831, 1836, 1839 (Crimes punishable in the county jail are tried in the justice of the peace courts by a six-man jury. Many such crimes have a one-year maximum term. Such crimes include, *e.g.*, offenses involving corruption in elections [MISS. CODE ANN. §§2031, 2032, 2114], escape or aiding escape of prisoners [§§2133, 2134, 2135, 2141], public officers' interest in contracts [§§2301, 2302], and trade marks [§§2390, 2391].

New York: CONSTITUTION, Art. 1, §2, Art. 6, §18; N.Y. CODE CRIM. PROC., §§701, 702, 710 (In counties outside New York City, a defendant may demand a jury of six for the trial of misdemeanors, which are punishable by up to one year's imprisonment); see Proposed N.Y. CONST. art. I, §76 (defeated at referendum Nov. 7, 1967) (extending six-man juries to misdemeanor cases in New York City).

Appendix C

Oklahoma: CONSTITUTION, Art. 2, §§19, 20; OKLA. STAT. tit. 11, §§958.3, 958.6, tit. 21, §10 (1961) (Jury of six in the county courts and other courts not of record, which have jurisdiction of misdemeanors, carrying a maximum penalty of one year's imprisonment).

Oregon: CONSTITUTION, Art. I, §11; CONSTITUTION (orig.) Art. VII, §12; ORE. REV. STAT., §§5.110 (Supp. 1967), 46.040, 46.175, 46.180 (1967) (Jury of six in county courts, which have jurisdiction of all crimes except those carrying the death penalty or life imprisonment. Jury of six in district courts, which have jurisdiction of all misdemeanors, punishable by one year's imprisonment).

Virginia: CONSTITUTION, Art. I, §8; VA. CODE ANN. §§16.1-123, 16.1-124, 16.1-126, 16.1-129, 16.1-132, 16.1-136 (1956), 18.1-6, 18.1-9 (1961), 19.1-206 (1960). (In courts not of record, which have jurisdiction of misdemeanors, punishable by up to one year's imprisonment, charges are tried without a jury. The defendant may appeal as of right to the circuit court, where he receives a trial *de novo*. All trials in the circuit court of offenses not felonious, whether in the first instance or on appeal, are with five jurors.)

(b) Nonunanimous verdict

One state authorizes nonunanimous jury verdicts in criminal cases in which a maximum sentence of imprisonment of one year may be imposed. The constitutional right to a jury trial has consistently been held to require*

* In three states, Louisiana, Texas and Oregon, nonunanimous verdicts are authorized in cases in which imprisonment for longer than one year is authorized.

unanimity in the verdict. *Andres* v. *United States,* 333 U. S. 740, 748 (1948); *Patton* v. *United States,* 281 U. S. 276, 288-290 (1930); *Thompson* v. *Utah,* 170 U. S. 343, 347, 350, 353 (1898); *Maxwell* v. *Dow,* 176 U. S. 581, 586 (1900); see *Comment, Should Jury Verdicts be Unanimous in Criminal Cases?* 47 ORE. L. REV. 417 (1968).

Oklahoma: CONSTITUTION, Art. 2, §§19, 20; OKLA. STAT. tit. 11, §§958.3, 958.6, tit. 21, §10 (1961) (In misdemeanor cases—those in which a sentence of up to one year's imprisonment may be imposed—in courts of record, a defendant may demand a jury of twelve; nine members of the jury may render a verdict. For the same crimes tried in courts not of record, the defendant may demand six jurors, five of whom may render a verdict).

(c) No jury trial of any kind unless defendant is first found guilty without a jury

The following five states authorize trials, without a jury, of all offenses carrying a maximum penalty of one year's imprisonment, but the defendant may appeal to a higher court where he is entitled to a common law jury (four states) or a jury of five (one state) upon his trial* de novo. *Thus, only persons found guilty are entitled to a jury trial. The Supreme Court has held that the Sixth Amendment guarantee of a jury trial requires a jury trial "from the first moment," and that a provision for a jury*

* In four other states—Maryland, Massachusetts, North Carolina and Pennsylvania (Philadelphia)—certain offenses punishable by more than one year's imprisonment are tried without a jury in the first instance, and a jury of twelve is available on appeal at a trial *de novo.*

trial de novo *is void. Callan* v. *Wilson,* 127 U. S. 540, 557 (*1888*).

Arkansas: CONSTITUTION, Art 2, §§7, 10; ARK. STAT. ANN. §§22-709, 22-737, 26-301, 26-608, 26-612, 26-620, 41-106, 43-1901, 43-1902, 43-2160, 44-210, 44-509 (1964) (No jury provided in municipal courts, which have jurisdiction of misdemeanors carrying a maximum penalty of one year's imprisonment. Upon conviction, the defendant may appeal to the circuit court where he is entitled to a trial *de novo* before a common law jury).

Maine: CONSTITUTION, Art I, §§6, 7; ME. REV. STAT. ANN. tit. 4, §152 (Supp. 1968), tit. 15, §§1, 451 (1965); ME. R. CRIM. P. 23(b), 31(a); *Sprague* v. *Androscoggin,* 104 Me. 352, 71 Atl. 1908 (1908); letter dated December 17, 1968, from Maine Attorney General's office to New York County District Attorney's office (Maine district courts try misdemeanors—crimes punishable by a sentence of up to one year—without a jury. A defendant may appeal his conviction to the Superior Court, however, where he is entitled to a common law jury).

New Hampshire: CONSTITUTION, Pt. 1, Arts. 15, 16, Pt. 2, Art. 77; N.H. REV. STAT. ANN. §599:1 (Supp. 1967), §§502-A:11, 502-A:12, 502-18 (1968) (District and municipal courts try, without a jury, misdemeanors, carrying a maximum term of imprisonment of one year. The defendant in these courts has an absolute right of appeal to the Superior Court where he may demand a jury of twelve in his trial *de novo*).

Rhode Island: CONSTITUTION, Art. 1, §§10, 15; R.I. GEN. LAWS §§9-10-12, 12-3-1, 12-17-1, 12-22-1, 12-22-9 (1956); *State* v. *Nolan*, 15 R.I. 529, 10 Atl. 481 (1887). (There are no juries in the district courts, which have jurisdiction of misdemeanors—crimes punishable by a fine of up to $500 or imprisonment for up to one year or both. A defendant may appeal his conviction to the Superior Court where he is entitled to a trial *de novo* before a jury of twelve).

Virginia: CONSTITUTION, Art. I, §8; VA. CODE ANN. §§16.1-123, 16.1-124, 16.1-126, 16.1-129, 16.1-132, 16.1-136 (1956), 18.1-6, 18.1-9 (1961). (In courts not of record, which have jurisdiction of misdemeanors, punishable by up to one year's imprisonment, charges are tried without a jury. The defendant may appeal as of right to the circuit court, where he receives a trial *de novo* with five jurors).

(d) Trial by the court alone, with no jurors at any stage

New York: CONSTITUTION, Art. 1, §2, Art. 6, §18; N.Y.C. CRIM. CT. ACT, §40.

CONTEMPT CASES, IMPRISONMENT FOR ONE YEAR*:

Kansas: KAN. GEN. STAT. ANN. §§20-1204, 21-111 (1964).

North Dakota: N. D. CENT. CODE ANN. §§5-01-22 (1960), 42-02-10 (1968).

South Dakota: S. D. CODE §§13.0607, 13.1235 (1939), 33.3703 (Supp. 1960).

* In *Bloom* v. *Illinois*, 391 U.S. 194, 210 (1968), the Court decided "to treat criminal contempt like other crimes insofar as the right to jury trial is concerned."

Appendix C

II. Common Law, Sixth Amendment Jury Trial for Offenses Punishable by Maximum Imprisonment of Six Months

Arizona: CONSTITUTION, Art. 2, §§23, 24; ARIZ. REV. STAT. §§12-123, 21-102, 21-103, 22-220, 22-301, 22-320, 22-371, 22-374, 22-402, 22-425; ARIZ. R. CRIM. PROC. 228, 300 (jury of six in lower courts for crimes punishable by no more than six months' imprisonment, with trial *de novo* before twelve jurors on appeal; jury of twelve in superior court for crimes punishable by more than six months).

Idaho: CONSTITUTION, Art. 1, §§7, 13; IDAHO CODE ANN. §§1-1406, 18-113 (1948), §2-105 (Supp. 1967).

Montana: CONSTITUTION, Art. 3, §§16, 23, Art. 8, §11; MONT. REV. CODE ANN. §§11-1602, 11-1603, 11-1702 (1957), 94-116 (1964); MONT. CODE CRIM. PROC. §§95-302, 95-303, 95-1901(c), 95-1905, 95-1915(a), 95-2004, 95-2005, 95-2006 (1968).

New Jersey: CONSTITUTION, Art. 1, pars. 9, 10; N. J. STAT. ANN. §§2A:3-4, 2A:3-5, 2A:74-1, 2A:74-2, 2A:169-4, *as amended,* ch. 113 [1968] N. J. Laws 315.

New Mexico: CONSTITUTION, Art. II, §§12, 14; N.M. STAT. ANN. §§36-3-4, 36-10-1, 36-10-2, 36-10-3, 36-10-4, 40A-1-11, 40A-29-1 to -23 (1968).

Washington: CONSTITUTION, Art. I, §§21, 22; WASH. REV. CODE ANN. §§2.36.050, 3.20.040, 10.49.020 (1961), 3.50.020, 3.50.280, 3.50.410, 3.66.010, 3.66.060 (Supp. 1967).

Appendix C

III. Common Law, Sixth Amendment Jury Trial for Offenses Punishable by Maximum Imprisonment of 90 days

Michigan: CONSTITUTION, Art. I, §§14, 20; MICH. COMP. LAWS ANN. §§730.264, 730.267, 730.412, 730.551 (jury of six in justice courts for crimes punishable by no more than three months' imprisonment, followed by trial *de novo* on appeal to the circuit court; jury of twelve in other cases).

Nebraska: CONSTITUTION, Art. I, §§6, 11, Art. V, §§16, 18; NEB. REV. STAT. ANN. §§18-205 (1962), 29-603, 29-604, 29-605 (1964), 29-601 (Supp. 1967).

IV. Common Law, Sixth Amendment Jury Trial for Offenses Punishable by Maximum Imprisonment of 30 days

Connecticut: CONSTITUTION, Art. 1, §§8, 19; CONN. GEN. STAT. ANN. §§51-266, 54-82 (1968).

Hawaii: CONSTITUTION, Art. I, §11, HAWAII REV. LAWS, §§231-9, 247-2 (1955), 216-7 (Supp. 1965); *Territory* v. *Kiyoto Taketa*, 27 Haw. 844, 847-849 (1924).

V. Common Law, Sixth Amendment Jury Trial for Offenses Punishable by Any Imprisonment

Alabama: CONSTITUTION, Art. 1, §§6, 11; ALA. CODE ANN. tit. 7, §264, tit. 13, §§126, 417, 423, 424, 429 (1968), 428 (Supp. 1967), tit. 15, §§321, 327 (1958); *Collins* v. *State*, 88 Ala. 212, 7 So. 260 (1890).

California: CONSTITUTION, Art. I, §7; CAL. PENAL CODE ANN. §§689, 1042 (1956), §190 (1968); *Ex parte Wong Yun Ting*, 106 Cal. 296, 39 Pac. 627 (1895).

Appendix C

Colorado: CONSTITUTION, Art. II, §§16, 23; COLO. REV. STAT. ANN. §78-7-4 (1963); COLO. R. CRIM. P. 1, 23(b), 54, 123(b), 131(a).

Delaware: CONSTITUTION, Art. I, §§4, 7, Art. 4, §30; DEL. CODE ANN. tit. 11, §5901 [the Delaware Attorney General's Office reports that as of February, 1969, defendants may elect to be tried by a jury of twelve in all cases].

Illinois: CONSTITUTION, Art. II, §§5, 9; ILL. ANN. STAT. c. 38, §103-6, c. 78, §§20, 23 (1965); *People* v. *Lobb*, 17 Ill. 2d 287, 161 N.E.2d 325 (1959).

Indiana: CONSTITUTION, Art. I, §13; IND. STAT. ANN. §§9-713, 9-1501 (1956), 4-303, 4-5904 (1968); *Alldredge* v. *State*, 239 Ind. 256, 156 N.E.2d 888 (1959).

Kansas: CONSTITUTION, BILL OF RIGHTS, §§5, 10; KAN. STAT. ANN. §§62-1401, 62-1412, 62-1501, 63-302 (1964).

Minnesota: CONSTITUTION, Art. 1, §§4, 6; MINN. STAT. ANN. §§593.01, 633.12 (1947), 609.095-.165 (1964); *State* v. *Everett*, 14 Minn. 439 (Gil. 330) (1869).

Missouri: CONSTITUTION, Art. I, §§18(a), 22(a); MO. ANN. STAT. §§543.010, 543.200, 543.210, 543.250, 546.390 (1953).

Nevada: CONSTITUTION, Art. I, §3; NEV. REV. STAT. §§4, 370, 175.011, 175.021, 175.481, 266.540, 266.550, 266.555 (1967).

North Dakota: CONSTITUTION, Art. I, §§7, 13; N.D. CENT. CODE ANN. §§29-01-06, 29-17-12, 33-12-19, 33-12-25 (1960), 40-18-15, 40-18-16, 40-18-17 (Supp. 1968).

Appendix C

Ohio: CONSTITUTION, Art. I, §§5, 10; OHIO REV. CODE ANN. §§2931.11, 2938.06, 2945.17 (1954), 1913.09, 2945.77 (Supp. 1966).

South Dakota: CONSTITUTION, Art. VI, §§6, 7; S.D. COMP. L. §§23-2-4, 23-53-4, 23-54-9, 23-56-5 (1957); *City of Sioux Falls* v. *Fanebust*, 72 S.D. 54, 29 N.W.2d 472 (1947).

Tennessee: CONSTITUTION, Art. I, §§6, 8, 9; TENN. CODE ANN. §§39-105, 40-2001 (1955), 40-2054 (Supp. 1968); *Memphis* v. *Trigally*, 46 Tenn. 382 (1869); *Woods* v. *State*, 99 Tenn. 182, 41 S.W. 811 (1897); *Willard* v. *State*, 175 Tenn. 642, 130 S.W.2d 99 (1939).

Vermont: CONSTITUTION, c. I, Arts. 10, 12; VT. STAT. ANN. tit. 12, §1505, tit. 13, §1 (1958); *State* v. *Hirsch*, 91 Vt. 330, 100 Atl. 877 (1916).

West Virginia: CONSTITUTION, Art. 3, §14; W. VA. CODE ANN. §50-18-7 (1966).

Wisconsin: CONSTITUTION, Art. I, §§5, 7; WIS. STAT. ANN. §§957.01 (Supp. 1967), 959.01 (1963); *Rothbauer* v. *State*, 22 Wis. 468 (1868); *State* v. *Gollmar*, 32 Wis.2d 406 (1966), 145 N.W.2d 670; *State* v. *Voss*, 34 Wis. 2d 501, 149 N.W.2d 595 (1967).

Wyoming: CONSTITUTION, Art. 1, §§9, 10, Art. 5, §§10, 22; WYO. STAT. ANN. §§5-123, 5-130, 5-133, 5-135, 7-409, 7-420, 7-427, 7-448 (1957); *Jarvis* v. *Brown*, 256 Pac. 336 (Wyo. 1927).

APPENDIX D

CRIMINAL COURT OF THE CITY OF NEW YORK

Case Load and Trials*

I

1968 Case Load

	Arraigments	*Dispositions***
Misdemeanors—non-traffic	112,699	109,035
Misdemeanors—traffic	144,603	65,233
Violations—non-traffic non-intoxication	176,582	135,800
Violations—public intoxication	9,186	9,049
Total	443,070	319,117

* Source: Records of the Director of Statistics of the Criminal Court of the City of New York. The Criminal Court also holds arraignments and preliminary hearings in felony cases, and all proceedings in traffic violation cases. These cases are not included herein.

** Includes cases from prior years.

Appendix D

II

1968 Trials

	Trials to Verdict	*Verdict of Conviction After Trial*	*Verdict of Acquittal After Trial*
Misdemeanors—non-traffic	9,328	5,059	4,269
Misdemeanor—traffic	2,747	1,218	1,529
Violations—non-traffic non-intoxication	9,206	5,935	3,271
Violations—public intoxication	114	33	81
Total	21,395	12,245	9,150

APPENDIX E

Dispositions of Non-Traffic Misdemeanor Cases by Courts of Inferior Jurisdiction in New York State*

County	*1960 Population*	*Number of Dispositions 1960*	*1966*
Total N. Y. City	7,781,984	119,878	140,667
Total Outside N.Y. City	9,000,320	29,059	38,266
Albany	272,926	688	993
Allegany	43,978	112	112
Broome	212,661	380	428
Cattaraugus	80,187	310	323
Cayuga	73,942	196	494
Chautauqua	145,377	353	538
Chemung	98,706	279	314
Chenango	43,243	163	210
Clinton	72,722	167	222
Columbia	47,322	159	199
Cortland	41,113	79	132
Delaware	43,540	126	140
Dutchess	176,008	717	1,046
Erie	1,064,688	4,415	3,533
Essex	35,300	119	120

* Source of upstate statistics: Division of Research, N.Y.S. Department of Correction, Mr. Alexander Barraco, Director.

Source of N.Y.C. statistics: For 1960 figures, 1960 Annual Report of the Court of Special Sessions of the City of New York, Table I; 1960 Annual Report of the Magistrates' Courts of the City of New York, Table I. For 1966 figures, 1966 Annual Report of the Criminal Court of the City of New York, Table I.

Appendix E

County	*1960 Population*	*Number of Dispositions 1960*	*1966*
Franklin	44,742	125	125
Fulton	51,304	62	85
Genesee	53,994	127	165
Greene	31,372	42	113
Hamilton	4,267	9	4
Herkimer	66,370	131	130
Jefferson	87,835	282	311
Lewis	23,249	45	38
Livingston	44,053	161	257
Madison	54,635	171	246
Monroe	586,387	2,025	2,571
Montgomery	57,240	80	68
Nassau	1,300,171	3,703	4,353
Niagara	242,269	1,065	1,017
Oneida	264,401	659	652
Onondaga	423,028	1,295	1,568
Ontario	68,070	143	238
Orange	183,734	543	823
Orleans	34,159	141	111
Oswego	86,118	235	182
Otsego	51,942	113	133
Putnam	31,722	65	110
Rensselaer	142,585	377	540
Rockland	136,803	342	478
St. Lawrence	111,239	331	346
Saratoga	89,096	151	205
Schenectady	152,896	354	397

Appendix E

County	*1960 Population*	*Number of Dispositions 1960*	*1966*
Schoharie	22,616	38	64
Schuyler	15,044	53	78
Seneca	31,984	64	83
Steuben	97,691	247	357
Suffolk	666,784	2,056	6,448
Sullivan	45,272	223	432
Tioga	37,802	77	84
Tompkins	66,164	167	215
Ulster	118,804	407	650
Warren	44,002	146	248
Washington	48,476	95	122
Wayne	67,989	271	269
Westchester	808,891	4,019	5,024
Wyoming	34,793	102	73
Yates	18,614	54	49

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 188

ROBERT BALDWIN,

Appellant,

against

NEW YORK,

Appellee.

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
As Amicus Curiae
Office & P. O. Address
80 Centre Street
New York, New York 10013

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MARIA L. MARCUS
Assistant Attorney General,
of Counsel.

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

TABLE OF CONTENTS

	PAGE
Interest of *Amicus*	1
Questions Presented	2
ARGUMENT:	
1. Section 40 of the New York City Criminal Court Act, which provides non-jury trials for misdemeanor charges carrying a maximum sentence of one year, is in harmony with the Sixth and Fourteenth Amendments of the United States Constitution	3
2. Appellant has not been deprived of equal protection of the laws by virtue of the availability of six-man "juries" to misdemeanants outside of New York City	9
Conclusion	17

TABLE OF CASES

Allied Stores of Ohio, Inc. v. Bowers, 358 U. S. 522 (1959)	14
Callan v. Wilson, 127 U. S. 540 (1888)	7
DeStefano v. Woods, 392 U. S. 631 (1968)	8
Duke v. United States, 301 U. S. 492 (1937)	8
Duncan v. Louisiana, 391 U. S. 145 (1968)	1, 4, 7, 11, 13, 16
Kramer v. Union Free School District, 395 U. S. ——, 37 U.S.L.W. 4530 (1969)	16

PAGE

Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61 (1961) 14, 16

McLaughlin v. Florida, 379 U. S. 184 (1964) 14

Missouri v. Lewis, 101 U. S. 20 (1879) 10, 12

Patton v. United States, 281 U. S. 276 (1930) 6, 7, 13

Puryear v. Hogan, et al., 24 N. Y. 2d 207 (1969) 2

Railway Express Agency, Inc. v. New York, 336 U. S. 106 (1949) 14

Salsburg v. Maryland, 346 U. S. 545 (1954) 9

Schick v. United States, 195 U. S. 65 (1904) 4, 8

Shapiro v. Thompson, 394 U. S. 618 (1969) 16

Snell v. Wyman, 281 F. Supp. 853 (S.D.N.Y. 1968), aff'd 393 U. S. 323 (1969) 15

State v. Maier, 13 N. J. 235, 9 A. 2d 21 (1953) 6

Thompson v. Utah, 170 U. S. 343 (1898) 7

Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U. S. 582 (1961) 14

FEDERAL STATUES AND RULES CITED

18 U.S.C. § 1 8

18 U.S.C. § 922(c) (1968) 9

18 U.S.C. § 922(e) (1968) 9

18 U.S.C. § 922(f) (1968) 9

Jury Selection and Service Act of 1968, 28 U.S.C. § 1865(b)(5) 9

Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2516(2) 8

PAGE

Criminal Code § 335, c. 321, 35 Stat. 1088, 1152, enacted 1909, eff. 1910 8

Fed. Rules Crim. Proc. 7(a) 8

STATE STATUES CITED

New York City Criminal Court Act § 40 ..1, 2, 3, 9, 13

New York Election Law § 152 5

New York Penal Law § 10.00(5) 5

New York Uniform City Court Act § 2011 13

New York Uniform District Court Act § 2011 .. 13

AUTHORITIES CITED

Frankfurter and Corcoran, "Petty Federal Offenses and the Constitutional Guarantee of Trial By Jury," 39 Harv. L. Rev. 917 (1926) 4, 5

Goebel & Naughton, Law Enforcement in Colonial New York (1944) 5

82 Harv. L. Rev. 1065 (1968) 14

Koestler, "Reflections On Hanging" (1956) 4

116 Pa. L. Rev. 924 (1963) 14

Russell On Crime, Vol. 1 (12th Ed. 1964) 4

Rutland, "The Birth of the Bill of Rights" (1955) .. 6

Stephen's Digest of the Criminal Law (9th Ed. 1950) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 188

ROBERT BALDWIN,

Appellant,

against

NEW YORK,

Appellee.

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

Interest of *Amicus*

Section 40 of the New York City Criminal Court Act provides that trials for misdemeanor charges carrying a maximum sentence of one year shall be conducted without a jury, but that defendants may request a trial before a panel of three judges.

Summary trials for certain offenses have been part of national and New York tradition since the colonial period. As this Court pointed out in *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), such trials were based upon the need for simplified judicial administration and rapid disposition of pending charges against defendants. These considerations are particularly compelling in New York City where 321,368 non-traffic misdemeanor cases were handled by 78

judges in the period from July, 1966 through December, 1968.*

As the chief legal officer of the State (New York Executive Law § 63), charged with the defense of enactments of our State Legislature (Executive Law § 71), the Attorney General is concerned with preserving the effectiveness and the constitutionality of State legislation. The procedure outlined in § 40 sets out a fair fact-finding process, which has resulted in an acquittal rate of approximately 49%.** Thus, the statute at issue insures the earliest possible hearing for defendants and, at the same time, preserves all essential elements of due process.

Moreover, the Attorney General is one of the appellees in the case of *Marvin Puryear* v. *Frank S. Hogan, District Attorney of N. Y. County and Louis Lefkowitz, Attorney General of the State of New York,* 24 N. Y. 2d 207 (1969) (Jurisdictional Statement filed in this Court on or about May 21, 1969), which also challenges the constitutionality of Sec. 40 of the New York City Criminal Court Act and which was decided by the Court below together with the instant case.

The Attorney General agrees with and fully endorses the position taken by the District Attorney of New York County in his brief in the within action with respect to his defense of the New York statute.

Questions Presented

1. Whether § 40 of the New York City Criminal Court Act, which precludes trial by jury in the New York City Criminal Court in misdemeanor cases punishable by sen-

---

* Opinion of the Court below, 24 N. Y. 2d 207, 218 (1969).

** For example, there were 5,072 misdemeanor trials (excluding traffic offenses) in the New York City Criminal Court from January to June of 1968; of these, 2,286 led to acquittals (Records of the Director of Statistics of the Criminal Court of the City of New York).

tence of up to one year, violates the Sixth Amendment to the United States Constitution and the due process guarantees of the Fourteenth Amendment.

2. Whether § 40 of the New York City Criminal Court Act, which precludes jury trials in the New York City Criminal Court in misdemeanor cases punishable by a sentence of up to one year, deprives appellant of equal protection of the laws under the Fourteenth Amendment because misdemeanor cases in other counties may be tried by a six-man "jury".

ARGUMENT

1. Section 40 of the New York City Criminal Court Act, which provides non-jury trials for misdemeanor charges carrying a maximum sentence of one year, is in harmony with the Sixth and Fourteenth Amendments to the United States Constitution.

A. Appellant maintains that New York's historical distinction between misdemeanors and felonies cannot be the basis for determining whether a criminal offense must be triable by a jury, because summary treatment under the common law was confined to such offenses as "disorderliness, drunkenness, vagrancy . . ."* However, it can be readily demonstrated that it was not the name of the crime which determined its treatment under the common law, but rather, the community view of that crime as shown by the sentence and other consequences attached to it.

For example, at the beginning of the 19th century, English law prescribed capital punishment for 220 to 230 offenses ranging from "the stealing of turnips to associating with gypsies, to damaging a fish pond, to writing threaten-

---

* Appellant's brief, p. 20.

ing letters, to impersonating out-pensioners at Greenwich Hospital . . .". Arthur Koestler, "Reflections On Hanging", p. 13 (1956). While in the present day, associating with gypsies might be of anthropological interest and impersonating an out-pensioner might be a nuisance, the English common law regarded these acts as warranting a jury trial because conviction resulted in imposition of the death penalty.

Viewed from a contemporary vantage point, "[t]here was no unifying consideration as to the type of criminal offense subjected to summary trial . . ." Frankfurter and Corcoran, "Petty Federal Offenses and the Constitutional Guarantee of Trial By Jury," 39 Harv. L. Rev. 917, 927 (1926). Included among the acts punishable as misdemeanors and tried summarily were "perjury, battery, libel, conspiracy, and public nuisance." *Russell On Crime,* Vol. 1, p. 6 (12th Ed. 1964). See also *Stephen's Digest Of Criminal Law,* pp. 284-285 (9th Ed. 1950).

Thus, it is clear that the "imprecise"* boundary between serious crimes and petty offenses cannot be determined merely by tracing a particular crime, such as larceny, to determine whether it was tried at common law with or without a jury. The crucial consideration is whether a particular crime is now viewed and punished as a misdemeanor or as a serious offense. The common law, especially that of the American colonial period, is relevant in demonstrating that the misdemeanor felony-distinction has existed for two centuries and has always governed the disposition and trial of conduct classified at a particular time as petty. Cf. *Schick* v. *United States,* 195 U. S. 65, 68-72 (1904).

New York law, under the indicia suggested by this Court in *Duncan* v. *Louisiana,* 391 U. S. 145 (1968), demonstrates that the serious crimes requiring a jury trial at common

---

* *Duncan* v. *Louisiana,* 391 U. S. 145, 159 (1968).

law are classified as felonies and carry sentences exceeding one year as well as grave civil disabilities, including permanent loss of the right to vote, the right to public office and the right to practice certain professions. New York Penal Law § 10.00(5); New York Election Law § 152.

The 1967 revision of the New York Penal Code by the legislature, which reduced certain felonies to misdemeanors and certain other criminal offenses to violations, indicates that those crimes which remain felonies are the only ones which are considered serious in the eyes of the community and are punished accordingly.

Appellant suggests that New York's practice with respect to misdemeanors may not be used as a guideline by this Court because (1) it is based upon "lack of concern of the aristocratic power structure for the rights of the lower classes"* and (2) "it was an experience unrepresentative of the practice throughout the other colonies and could not have been within the contemplation of the drafters of the amendment."**

For the first proposition, appellant cites Goebel and Naughton, *Law Enforcement in Colonial New York*, 379 (1944). This text does not purport to compare New York with other states, but merely points out that transported offenders and indentured servants, as well as certain economic factors, created a vagrancy problem. In point of fact, this problem was common to all the colonies and summary powers were invoked in a number of jurisdictions to deal with the crimes resulting from these social factors. New Jersey, Pennsylvania, and Virginia are examples. Frankfurter and Corcoran, *supra*, pp. 950, 955, 962. See

---

* Appellant's brief, p. 17.

** Appellant's brief, p. 19.

also *State* v. *Maier*, 13 N. J. 235, 9 A. 2d 21, 34-35 (1953). As pointed out in Frankfurter and Corcoran, at p. 933:

> "The settled practice in which the founders of the American Colonies grew up reserved for the justices innumerable cases in which the balance of social convenience, as expressed in legislation, insisted that proceedings be concluded speedily and inexpensively."

The history of New York State shows a consistent concern for the preservation of all the due process rights which were cherished as a legacy of the English common law. The New York Constitution of April 20, 1777 recognized that no citizen was to be deprived of any rights or privileges unless by the law of the land or the judgment of his peers. In 1787, a 13 point bill was passed which was, in effect, a declaration of rights and safeguarded all New York residents against arbitrary arrest and excessive fines or cruel punishments, as well as providing for free elections so that the legislature could express the will of the majority. See, *e.g.*, *"The Birth of the Bill of Rights"*, by Robert Rutland, Institute of Early American History and Culture (1955) at pp. 62 and 99.

Far from being "unrepresentative of the practice throughout the other colonies", New York's one-year cut-off point is utilized in many jurisdictions. Since a jury as defined by this Court in *Patton* v. *United States*, 281 U. S. 276, 288 (1930), must consist of 12 men rendering a unanimous verdict, it can readily be seen that a large number of states would be affected if the Sixth Amendment's guarantee of a right to jury trial applied to offenses punishable by up to one year's imprisonment. As indicated in Appellant's Appendix A, 9 states provide juries of fewer than 12 persons for crimes punishable by maximum sentences of one year. In 8 others, jury trials are provided only on appeal for persons who have previously been convicted after a trial without jury, in offenses carrying

a one-year term (*cf. Callan* v. *Wilson,* 127 U. S. 540, 557 [1888]). In addition, four states permit non-unanimous verdicts as to offenses carrying a penalty of one year.

In an attempt to evade the fact that New York City's practice is in harmony with "the existing laws and practices in the Nation",* appellant proposes in a footnote that he merely be granted "some form of adjudication by his peers."** The problems posed by this suggestion are manifold. If 12 jurors are not necessary, would 3 be sufficient? (Defendants may presently elect 3-judge panels in the New York City Criminal Court.) How many peremptory challenges will be permitted? How many challenges for cause? At what stage must such a jury be made available? Appellant's suggestion not only requires reversal of this Court's decisions in *Patton* v. *United States, supra,* and *Thompson* v. *Utah,* 170 U. S. 343 (1898), but also would initiate endless new litigation as to innumerable permissible variations on appellant's formula.

However, this Court indicated in *Duncan* v. *Louisiana, supra,* 391 U. S. at p. 158, n. 30, that the invalidation of non-jury trials as to those sentenced to two years' maximum imprisonment would have no far-reaching effect on the states:

> "It seems very unlikely to us that our decision today will require widespread changes in state criminal process . . . [M]ost of the states have provisions for jury trials equal in breadth to the Sixth Amendment, if that amendment is construed, as it has been, to permit the trial of petty crimes and offenses without a jury. Indeed, there appear to be only four states in which juries of fewer than 12 can be used without the defendant's consent for offenses carrying a maximum penalty of greater than one year. Only in Oregon and

---

* *Duncan* v. *Louisiana, supra,* 391 U. S. at 160 (1968).

** Appellant's brief, p. 14, n. 10 (commencing on p. 13).

> Louisiana can a less-than-unanimous jury convict for an offense with a maximum penalty greater than one year.''

This comment is significant not only because of its assumption that a 12-man unanimous jury is required where the Sixth Amendment is applicable, but also because it uses one-year penalties as its reference point. This logical reference point is also noted in *DeStefano* v. *Woods,* 392 U. S. 631, 633 (1968).

B. Appellant implies that 18 U.S.C. § 1, which provides that petty offenses are a class of misdemeanors with a six-month maximum sentence, must be followed as a guideline by all the states.* However, Congress appears to have drawn the line somewhat arbitrarily at six months in an attempt to describe a type of misdemeanor rather than to define the maximum constitutional limitation of sentences for offenses tried without a jury. *Duke* v. *United States,* 301 U. S. 492 (1937). The legislative history of 18 U.S.C. § 1 suggests that Congress was of the view that offenses punishable by imprisonment of at least one year could constitutionally be tried in the federal courts without a jury, and settled upon six months in order to fall well within constitutional requirements. See 72 Cong. Rec. 9992 (1930).

Indeed, New York's one-year dividing line between serious and petty offenses relates to a number of existing federal statutes. The constitutional right to be indicted by a Grand Jury, for example, applies only to offenses punishable by more than one year's imprisonment. See *Schick* v. *United States, supra,* 195 U. S. at p. 68; *Duke* v. *United States, supra,* discussing Criminal Code § 335, c. 321, 35 Stat. 1088, 1152, enacted 1909, eff. 1910; Fed. Rules Crim. Proc. 7(a).

Other statutes revolving around a one-year division are the Omnibus Crime Control and Safe Streets Act of 1968,

---

*Appellant's brief, p. 12.

18 U.S.C. § 2516(2), authorizing wire tapping by State court order in investigation of crimes punishable by more than one year's imprisonment; the Jury Selection and Service Act of 1968, 28 U.S.C. § 1865(b)(5) disqualifying for service on grand and petit juries only those who have been convicted of a crime carrying more than a one-year sentence; and 18 U.S.C. §§ 922(c), (e), (f) (1968), making it a federal crime to sell, receive or ship firearms through interstate commerce to persons under indictment or convicted of a crime punishable in any jurisdiction by imprisonment for a term exceeding one year.

Thus, it is indisputable that New York's historical evaluation of crimes punishable by a one-year maximum as petty is far from unique; indeed, it has been sanctioned not only by state legislatures, but in several instances by the United States Congress.

2. Appellant has not been deprived of equal protection of the laws by virtue of the availability of six-man "juries" to misdemeanants outside of New York City.

A. Appellant also contends that since he could have a six-man jury trial if he had been prosecuted for a misdemeanor outside of New York City, denial of a jury under § 40 of the New York City Criminal Court Act deprives him of equal protection of the laws. He adds that "the caseload of the New York City Criminal Court does not provide a constitutionally sound rationale for approving that discrimination."*

As pointed out by the Court below, this Court disposed of such a claim in *Salsburg* v. *Maryland*, 346 U. S. 545, 551 n. 6 (1954), quoting from the earlier decision in

---

*Appellant's brief, p. 41.

Missouri v. *Lewis*, 101 U. S. 20, 31 (1879). This Court held:

> "There is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. *This would not, of itself within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the law.* * * * *It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.* (emphasis added)
>
> "The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several States without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same State."

Appellant's attempt to distinguish *Missouri* v. *Lewis*, *supra*, is completely unsuccessful. He contends:

> "In *Missouri* v. *Lewis*, *supra*, a statute that provided a different appellate court for appeals from circuit courts in the City of St. Louis and its adjoining

> counties than for the rest of the State was held not to violate the Equal Protection Clause . . . Thus, as the dissent below pointed out, the *Lewis* case would be support for the majority's conclusion only 'if Missouri had denied appeals from St. Louis courts while providing for them in all other parts of the State of Missouri.' "*

Appellant overlooks the fact that trial by jury is merely one mode of arriving at a just and fair decision in a criminal case. This Court made clear in *Duncan* (391 U. S. at 149, n. 14):

> "Of each . . . [determination] that a constitutional provision originally written to bind the Federal Government should bind the states as well it might be said that the limitation in question is not necessarily fundamental to fairness in every criminal system that might be imagined but is fundamental in the context of the criminal processes maintained by the American States.
>
> When the inquiry is approached in this way the question whether the states can impose criminal punishment without granting a jury trial appears quite different from the way it appeared in the older cases opining that states might abolish jury trial. . . . A criminal process which was fair and equitable but used no juries is easy to imagine. It would make use of alternative guarantees and protections which would serve the purposes that the jury serves in the English and American systems. Yet, no American State has undertaken to construct such a system."

Justice White's analysis unequivocally states that juries and fundamental fairness are neither equivalent nor inseparable. Indeed, the concept of fundamental fairness in determining the facts bears no immutable relationship to

---

* Appellant's brief p. 41.

the question of the body to make the determination. Factual findings may be made by juries of various sizes, administrative hearing officers and boards, joint boards including legal officers and laymen.

Statistics indicate that almost half of the defendants in the New York City Criminal Court who go to trial are acquitted. From January to June of 1968 there were 5,072 misdemeanor trials (excluding traffic offenses) in the New York City Criminal Court. Of these, 2,786 led to convictions while 2,286 led to acquittals.* It should also be noted that under Section 40 of the New York City Criminal Court Act, the defendant has a right to a trial before three judges of that Court. In the representative year of 1964, such three-judge panels tried 11,678 cases to conclusion, resulting in 7,136 convictions.**

Thus, New York State's procedure does not deprive City residents of a fair fact-finding process, but only provides a different form for arriving at a conclusion in a criminal case. *Missouri* v. *Lewis* remains relevant in evaluating this process.

---

* See Records of the Director of Statistics of the Criminal Court of the City of New York.

The president of the Legal Aid Society in New York City recently reported that 49% of the Society's clients who were tried in the New York City Criminal Court in 1967 (without a jury) were acquitted; there were 3,023 convictions after trial, 2,678 acquittals after trial. Speech at annual Judicial Conference of the Second Judicial Circuit of the United States, Lake Placid, N. Y. September 14, 1968, reprinted in N. Y. Law Journal, September 25, 1968, p. 1.

Although no figures are presently available on a state-wide level as to the percentage of acquittals after 6-man jury trials in misdemeanor cases, it is unlikely that such percentages would be more favorable to defendants than the acquittal rate in the New York City Criminal Court. For example White Plains had six such jury trials in the period from July 1, 1968 to June 30, 1969. All resulted in convictions. (Yearly Report of Edwin Van Tassel, Chief Clerk, City Court, White Plains, New York.)

** Annual Report of the New York City Criminal Court (1964), Table 1, pp. 12-17.

Moreover, if the mere difference in procedure were to result automatically in a violation of equal protection of the laws, a number of anomolous situations would arise. For example, a criminal defendant charged with the commission of a Class B misdemeanor, carrying an authorized three-month prison term, is afforded a jury trial outside of New York City, *New York Uniform District Court Act*, § 2011; *New York Uniform City Court Act* § 2011. Adherence to appellant's rationale would mean that if Class B misdemeanor cases carrying a three-month sentence are not tried by a jury in New York City, New York defendants would be deprived of constitutional rights.

And, of course, equalization of the rights of defendants outside of New York could also be accomplished by merely abolishing all forms of jury trial for misdemeanants outside New York City.

Thus, it is clear that the more liberal provisions for six-man juries in some areas of New York State are totally irrelevant to any of appellant's constitutional rights. If *Duncan* v. *Louisiana* should be applied so as to invalidate § 40 of the New York City Criminal Court Act, then the juries provided outside New York City would also be inadequate, since they are not the common law jury required by this Court in *Patton* v. *United States, supra*. See also *Duncan* at p. 158, n. 30. If (as shown in Point I, *supra*) *Duncan* does not apply, New York's experimentation with more liberal or different procedures in some areas may not be penalized if it is based upon valid State considerations.

The Court below cited "the overburdening caseload existing in the criminal courts of the highly populated City of New York"* as a reason for upholding the territorial distinction. The figures cited in the opinion support the finding that New York City must be considered in an

---

*24 N. Y. 2d 207, 218 (1969).

entirely different category from New York's other population centers:

> "From July, 1966 through December, 1968 the New York City Criminal Court disposed of 321,368 non-traffic misdemeanor cases; whereas in the next largest city, Buffalo, the City Court disposed of 8,189 non-traffic misdemeanor cases. Although it is true that the population of New York City is approximately 15 times as large as Buffalo's, the figures still reflect an enormous disproportion, since New York City's caseload is more than 39 times as great. Moreover, only 78 judges were available in the New York City Criminal Courts to hear those 321,368 misdemeanors whereas in Buffalo there were 12 judges available to hear the 8,189 misdemeanors, a ratio of 6½ to 1, as compared to a caseload ratio of 39 to 1."

B. It is interesting to note that in his attempt to discount the State's obvious interest in efficient judical administration, appellant argues that a "compelling interest" must be shown in order to uphold §40 of the New York City Criminal Court Act.* This suggestion appears in the middle of appellant's argument concerning equal protection of the laws and geographical distinctions. Adoption of appellant's rationale would dispense with this Court's interpretation of the equal protection clause in countless cases throughout this century. *Lindsley* v. *Natural Carbonic Gas Company,* 220 U. S. 61 (1961); *Two Guys from Harrison-Allentown, Inc.* v. *McGinley,* 366 U. S. 582, 591-592 (1961); *Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U. S. 522, 528 (1959); *Railway Express Agency, Inc.* v. *New York,* 336 U. S. 106, 110 (1949); *McLaughlin* v. *Florida,* 379 U. S. 184, 191 (1964). See also 82 Harv. L. Rev. 1065, 1076-1132 (1968); 116 Pa. L. Rev. 924, 930 (1963).

---

* Appellant's brief, p. 43.

As this Court said in *McGowan* v. *Maryland,* 366 U. S. 420, 425 (1961):

> "The standard under which [equal protection] is to be evaluated has been set forth many times by this Court. Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if classification rests on grounds wholly irrelevant to the achievement of the State's objective."

A parallel standard has been approved by this Court in analyzing claims of deprivation of due process. See, *e.g., Snell* v. *Wyman,* 281 F. Supp. 853 (S.D.N.Y. 1968), *aff'd.* 393 U. S. 323 (1969), where the three-judge district court held (281 F. Supp. at 862, n. 19):

> "Our point is the narrower one that the limited right of substantive due process insures only against the capriciousness reaching a level of irrationality, not against judgments of policy that may be unwise or even 'harsh' in their balancing of competing interests."

Appellant herein asserts that "recent decisions" of this Court demonstrate that "'where rights of fundamental public importance are involved, geographic or other classifications will no longer satisfy the Equal Protection Clause merely because they have a rational basis.'"* However, the decisions cited concern two areas which have explicitly been made exceptions to the traditional equal protection standard. The first of these areas is the right to vote (see

---

* Appellant's brief, p. 43.

e.g., Kramer v. *Union Free School District,* 395 U. S. —— [1969], 37 U.S.L.W. 4530 [1969]); the second is the right to travel (*Shapiro* v. *Thompson,* 394 U. S. 618 [1969]). Neither of these cases in any way indicated that this Court was prepared to abandon the carefully defined analysis of *McGowan* v. *Maryland, supra,* and *Lindsley* v. *Natural Carbonic Gas Company, supra.*

Appellant offers no reason for creating a new exception in the case at bar. The fact that a geographic classification has been placed in issue does not, in the absence of a deprivation of the right to vote, establish any particular basis for applying an unusual test of State authority. Nor does the assertion of "public importance" create such a basis; indeed, presumably any colorable claim under the equal protection or due process clauses concerns questions of public importance. This Court has required demonstration of a "compelling interest" under exceptional circumstances where the rights at issue are incidents of national citizenship or intrinsic in the electoral process.

The proper standard in the case at bar must be a showing of a valid State interest. As previously indicated, this Court has already ruled that trial before a judge alone does not result in an absence of fundamental fairness.* *Duncan* v. *Louisiana, supra,* 391 U. S. at 149, n. 14.

The basic reason for proceeding without jury trials under the common law was the benefit "to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications." *Duncan* v. *Louisiana,* 391 U. S. at p. 160. This purpose remains valid today, and is as beneficial to defendants as to the State. Offenses carrying relatively minor sentences must be tried at the earliest possible time in order to protect the innocent from the strain

---

* This is further evidenced by appellant's own showing that jury trials are waived in most cases (Appellant's brief, p. 33).

and humiliation of a pending criminal charge. A delay may lodge such a charge against a defendant for a longer period than that for which he could be imprisoned if convicted. Thus, New York's continuation of its common law tradition is both constitutionally permissible and supportive of the interests of justice.

CONCLUSION

The judgment appealed from should be affirmed.

Dated: New York, New York, October 7, 1969.

Respectfully submitted,

Louis J. Lefkowitz
Attorney General of the
State of New York
As Amicus Curiae

Samuel A. Hirshowitz
First Assistant Attorney General

Maria L. Marcus
Assistant Attorney General,
of Counsel.